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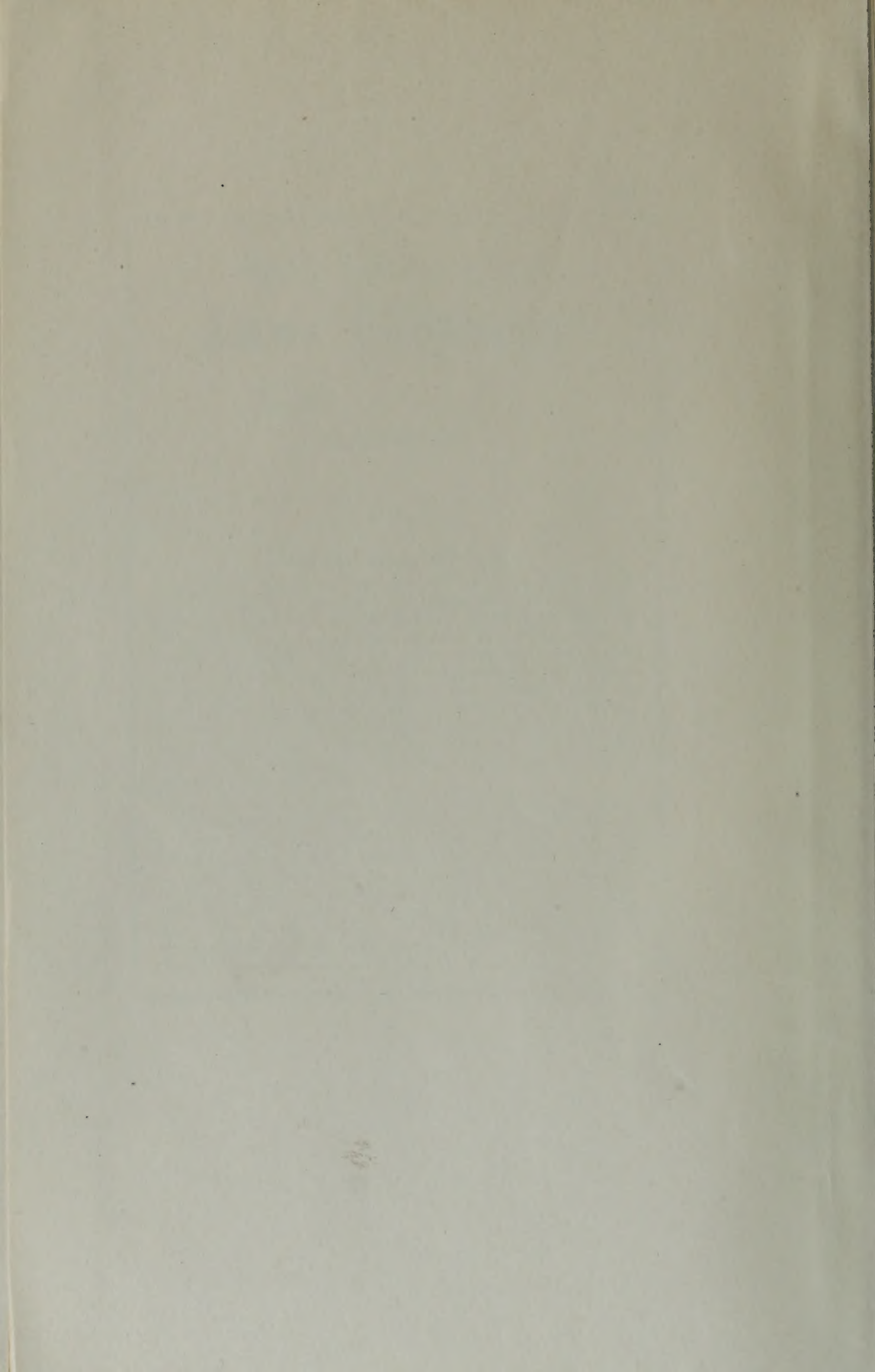
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942
No. 2572

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. J. BUCHLER, Appellant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Appellees.

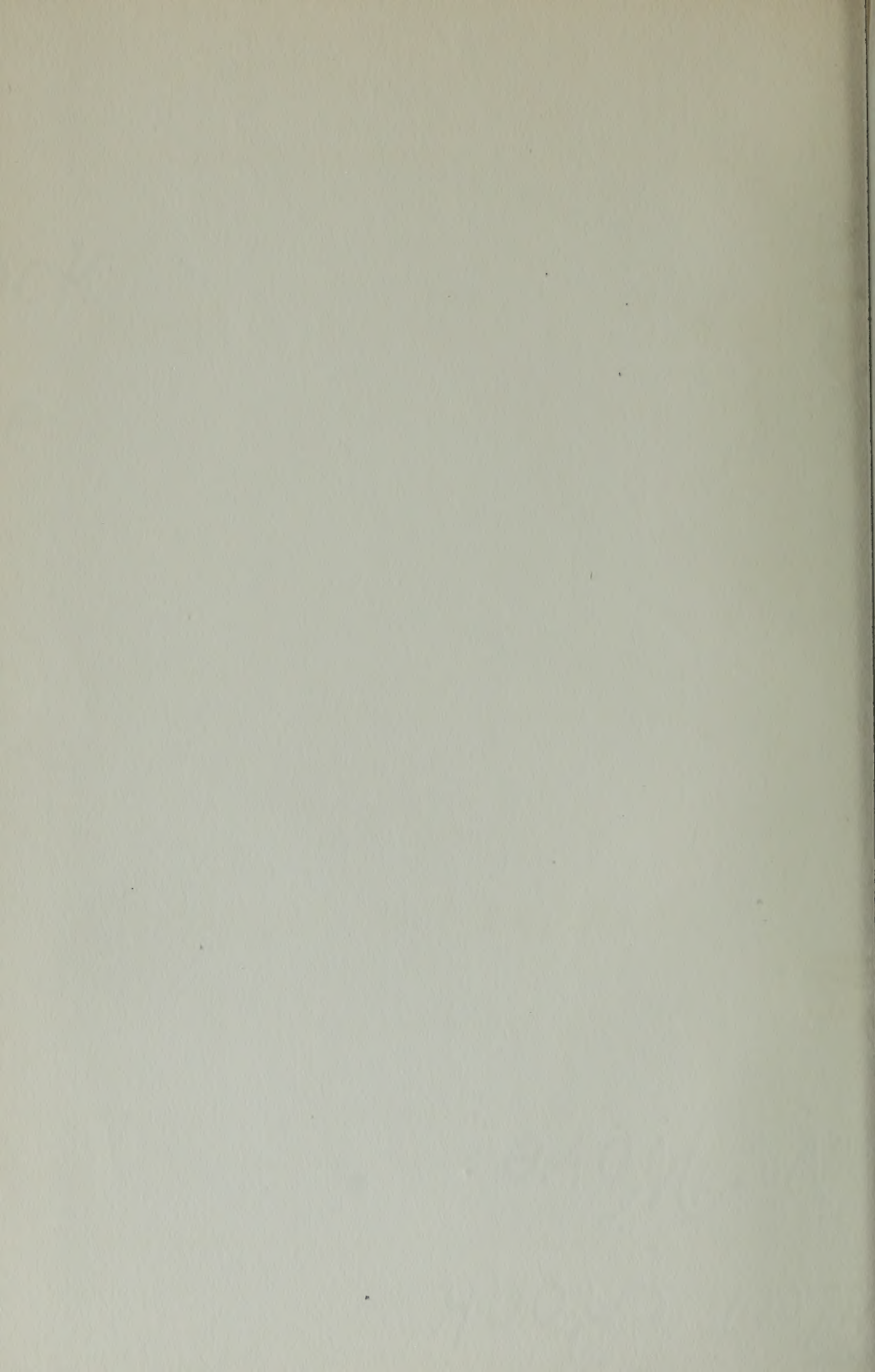
TRANSCRIPT OF RECORD

Filed

FEB 23 1915

F. D. Monckton,

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division



No. _____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

G. J. BUCHLER, Appellant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court for the
Western District of Washington, Northern Division

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

WATER RESOURCES DIVISION
SALT LAKE CITY, UTAH
JANUARY 1964

TRANSCRIPT OF RECORD

HEARD AND RECEIVED AT THE
SALT LAKE CITY, UTAH

IN THE MATTER OF THE

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*In the District Court of the United States for the Western
District of Washington. Northern Division*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

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Everett, Washington.

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Solicitor for Defendant Frank L. Bell,

Glens Falls, New York.

[Clerk's Note:—Headings herein that are placed in brackets are not a part of the original record on file but have been inserted by the Clerk of the District Court for the purpose of identification.]

In the District Court of the United States, for the Ninth Circuit, Western District of Washington, Northern Division. (In Equity.)

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING COMPANY, a Corporation, Defendants.

No. 2112

Bill of Complaint

To the Judges of the District Court of the United States, for the Ninth Circuit, Western District of Washington, Northern Division:

G. J. Buchler, a citizen of the State of Pennsylvania, residing at Philadelphia, in said state, brings this his bill of complaint, against W. W. Black, a citizen of the State of Glens Falls, in said state, and against Sunset Copper Mining Company, a corporation organized under and by virtue of the laws of the State of Washington, and a citizen of the said State of Washington, defendants.

And thereupon, your orator complains and says:

I.

That he is now, and at all times hereinafter mentioned was, a citizen of the United States of America, and a citizen of and resident within the State of Pennsylvania.

II.

That the defendant, W. W. Black, is now, and at all times hereinafter mentioned was, a citizen of the United States of America, and a citizen of and resident within the State of Washington, Western District, Northern Division, thereof.

III.

That the defendant, Frank L. Bell, is now, and at all times hereinafter mentioned was, a citizen of the United States of America, and a citizen of and resident within the State of New York.

IV.

That the defendant, Sunset Copper Mining Company, a corporation, organized under and by virtue of the laws of the State of Washington, is now, and at all times hereinafter mentioned was, a citizen of and resident within the State of Washington, Western District, Northern Division, thereof.

V.

That certain mining property hereinafter described, and now held and claimed by the defendants, W. W. Black and Frank L. Bell, is the matter in controversy in this suit; that the matter in controversy greatly exceeds in value the sum of Three Thousand (\$3000.00) Dollars, exclusive of all interest and costs.

VI.

That the defendant, Sunset Copper Mining Company, so organized and existing under the laws of the State of Washington, had and has its principal place of business, according to its incorporation laws, at Everett, in said state; that the defendant corporation was organized in 1897, with a capital stock of 1,000,000 shares at the par value of \$1.00 per share; that later, to-wit, November 17, 1900, its capital stock was increased to 2,000,000 shares, the additional 1,000,000 shares also having a par value of \$1.00 per share.

VII.

That the plaintiff is now, and at all times since the year 1902 has been a stockholder of the defendant corporation, owning and holding 58,250 shares of capital stock thereof; that this suit is in no manner whatsoever brought collusively for the purpose of conferring jurisdiction on a court of the United States, but that it is brought in this court in absolute good faith as the only court in which he can secure full and complete redress for the wrongs committed against him and hereinafter set out.

VIII.

That the said defendant corporation, prior to March, 1909, became the owner and holder of thirty-six certain valuable mining claims, known as Sunset, Glens Falls, Lebanon, Fourth of July Extension, Copper King Extension, Brown Bear, Star, Star No. 2, Fourth of July, Success, Miss Helen, Mountain Side No. 4, Mountain Side No. 2, Ravine Extension, Mountain Side No. 3, Mountain Side, Ravine, Mono, Mono No. 2, Lost Art, Ivy R., Hazel C., Black Bear Extension, Boundary, Lloyd B., Black Bear, W. H. B., Mabel, Copper King, River Side, Sunset Extension, Glens Falls Extension, Lebanon Extension, Crown Point, Crown Point No. 2, Crown Point No. 3, contiguous lodes mining claims, U. S. Mineral Survey No. 1026, bearing gold, silver and copper, situate, lying and being in Sections 35 and 36, Township 28 North, Range 10 East W. M.; Sections 1 and 2, Township 27 North, Range 10 East W. M.; Section 6, Township 27 North, Range 11 East W. M., unsurveyed in the Index Mining District, Snohomish County, Washington. Said claims are more particularly described according to the official plat thereof on file in the office of the Registrar of the United States Land Office at Seattle, State of Washington, a copy of which said description is hereunto attached, marked "Exhibit A" and thereby made a part of this bill of complaint; that the said defendant corporation, prior to March, 1909, also became the owner and holder in fee simple of the North one-half ($N\frac{1}{2}$) of Section One (1) of Township Twenty-seven (27) North, Range Ten (10) East W. M.; also one certain tramway from the said mining claims to the town of Index; also one certain bridge across the Skykomish River at the same place.

IX.

That the said defendant, W. W. Black, is now, and has been since about the year 1900 or 1901, one of the trustees of the said defendant corporation, Sunset Copper Mining Company, and has since that time acted as resident manager thereof, or has assumed so to act.

X.

That although the principal place of business was in Everett, in the State of Washington, all the corporate books of record and account, and all other papers connected with the management of the said corporation, were permitted to

be taken from the State of Washington, contrary to the statute of said state, and were sent to Glens Falls, State of New York; that said books of record and account and other papers of the said defendant corporation were thereafter kept and permitted to remain in the State of New York, where they were not available or open to inspection by the stockholders of the said corporation; that this was all done and permitted with the knowledge and full assent of the defendant trustee, W. W. Black, and the defendant, Frank L. Bell, and contrary to the laws of the State of Washington.

XI.

That a short time after the capital stock of the defendant corporation was increased to 2,000,000 shares, one W. H. Baldwin became the owner and holder of a majority of all the stock so issued; that the par value of the said stock was \$1.00 per share; that the said stock was issued and sold to him, either directly from the defendant corporation for 2½c per share, or was transferred, assigned and sold to him by one John E. McManus, who was at that time the Secretary-Treasurer of the defendant corporation, and by M. Egbert Bros., and by other stockholders whose names are unknown to this complainant; that none of these stockholders had paid more than 2½c per share to the defendant corporation for the said stock so sold and assigned; that thereafter, to-wit, on the 7th day of October, 1903, the officers and trustees of the said defendant corporation wrongfully and fraudulently increased the capital stock of the said defendant corporation to 3,000,000 shares, without the knowledge or assent of the minority stockholders, of which this complainant is one, and without notice of a meeting of the stockholders called for that purpose, as required by the laws of the State of Washington; that this additional 1,000,000 shares was of the par value of \$1.00 per share; that the said W. H. Baldwin, owning a majority of all the stock already issued, thereafter became the owner and holder of a large number of shares of this additional stock, so fraudulently issued; that he promised to pay to the said corporation the sum of 10c per share; that the said corporation sold and delivered these shares of stock directly to the said W. H. Baldwin; that although he promised to pay 10c per share, he actually paid not to exceed 2½c per share; that he continued to hold all the stock so issued to him until his death, about the year 1907; that at the time of his death he was the owner and holder of a total of 1,250,000 shares of the stock of the said

defendant corporation; that this said amount was a majority of all the shares of stock so issued and outstanding.

XII.

That the said defendants, W. W. Black, acting as one of the trustees, and as resident manager of the said company, and Frank L. Bell, acting as attorney for W. H. Baldwin up to the time of his death, and afterward acting for his own interests as a majority stockholder and as co-trustee of the said corporation, as hereinafter set out, conspired and confederated one with the other, and with the said W. H. Baldwin and one Henry C. McNutt, and other persons unknown to this plaintiff, for the purpose of defrauding the minority stockholders of said corporation out of their rights and interests, and for the purpose of manipulating and handling the business of the said corporation in such manner as to throw the said corporation into insolvency, and for the purpose of converting the assets of the said corporation to their own use and benefit, and to the injury of this plaintiff, and all other minority stockholders; that so conspiring and confederating, and in pursuance of such purpose, between the years 1902 and 1906 the trustees and officers of the said defendant corporation, acting under the influence, direction and control of the said defendants W. W. Black and Frank L. Bell, at attorney for W. H. Baldwin, caused to be executed at Glens Falls, in the said State of New York, by the said corporation, the following described notes, each and all of which said notes were signed by the defendant corporation, Sunset Copper Mining Company, by its President and Secretary, drawn in favor of Ellen C. Baldwin, the wife of W. H. Baldwin:

One note dated November 3, 1903, payable in 1 year for \$5,000.00;

One note dated November 13, 1903, payable in 1 year for \$1,000.00;

One note dated November 20, 1903, payable on demand for \$1,000.00;

One note dated November 27, 1903, payable on demand for \$3,000.00;

One note dated February 8, 1904, payable on demand for \$5,000.00;

One note dated February 8, 1904, payable on demand for \$5,471.00;

One note dated August 3, 1904, payable on demand for \$4,263.60;

One note dated September 17, 1904, payable on demand for \$4,649.50;

making a total of Twenty-nine Thousand Three Hundred Eighty-four and ten one-hundredths (\$29,384.10) Dollars; that as security for these notes the trustees and officers caused to be executed two mortgages, one dated December 31, 1904, and one dated February 10, 1905, conveying all the real and chattel property of the said defendant corporation as security for the above described notes and the interest due thereon; that all of these notes were as a matter of fact executed without any consideration whatsoever; that this apparent indebtedness in favor of Ellen C. Baldwin, was created at a time when her husband, W. H. Baldwin, and her brother-in-law, Henry C. McNutt, and the defendant, W. W. Black, were members of the Board of Trustees; that all of this indebtedness was to the knowledge of both the defendants Black and Bell, collusive and fraudulent as against the minority stockholders and bona fide creditors of the corporation; that all these transactions were carried on outside the State of Washington and in the State of New York, and by and with the consent of the said defendant, W. W. Black, and during the time he was acting as trustee of the said defendant corporation; and by and with the consent and active participation of the defendant Frank L. Bell, acting as attorney for W. H. Baldwin.

XIII.

That in January, 1908, the annual meeting of the stockholders of the defendant corporation was held in the said defendant, W. W. Black's office, in Everett, in the State of Washington; that at the said meeting, in pursuance of the said conspiracy and fraudulent purpose, Henry G. McNutt, A. G. Sellingham, and John C. Davis, all residents of Glens Falls, State of New York, and E. M. Metzger and the defendant W. W. Black, both of Everett, State of Washington, were elected trustees; that the said John C. Davis was given, without any consideration, ten shares of stock by the said Henry C. McNutt, in order that the said Davis might be apparently qualified to act as a trustee for the said defendant corporation; that he was so elected by the

votes of proxies held by the defendant W. W. Black, in order that a majority of the trustees should be residents of Glens Falls, State of New York.

XIV.

That prior to the said annual meeting, the said Baldwin had died, leaving the said 1,250,000 shares of stock of the defendant corporation in the name of his wife, Ellen C. Baldwin; that thereafter, and about May, 1908, the said Mrs. Ellen C. Baldwin sold, assigned and transferred all her right, title and interest in the above mentioned notes and mortgages, and also the 1,250,000 shares of stock of the defendant corporation to Frank L. Bell, of Glens Falls, State of New York, her counselor and attorney at law; that each and all of said notes were so purchased by the said defendant Bell long after the date of their maturity; that the said defendant, Frank L. Bell, had been the attorney and counselor at law for W. H. Baldwin and his wife, Ellen C. Baldwin, for some years previous to this transfer; that he had full knowledge of the alleged loans that had been secured from the said Ellen C. Baldwin for the said defendant corporation; that he knew the large part of said claims so assigned by the said Ellen C. Baldwin were collusive and fraudulent, and were not properly due and owing from the said defendant corporation; that he knew the amount of stock so transferred was a majority of all of the stock issued and outstanding, and that after said transfer he would be able to control the said defendant corporation by acting in collusion with the said defendant, W. W. Black, and that said purchase was made in order to further the said fraudulent attempt to convert the property and assets of the said defendant corporation to their own use and benefit, and to the loss and injury of the minority stockholders.

XV.

That thereafter, further conspiring and confederating, and for the express purpose of converting all of the said assets of the said defendant corporation to the use of the said W. W. Black and the said Frank L. Bell, on November 30, 1908, suit was begun in the Superior Court of Snohomish County by the said defendant, Frank L. Bell, against the defendant corporation, which case is, according

to the records on file in the Clerk's office of the Superior Court for the said Snohomish County, the case of Frank L. Bell vs. Sunset Copper Mining Company, case No. 9510; that in the said complaint it was alleged that the defendant corporation was insolvent and unable to pay its debts, which were alleged to be more than \$40,000.00; that it was further alleged that although the said defendant corporation had no cash in hand, the mining claims which were held by it were very valuable, and that the mining claims so owned would be forfeited if the assessments were not paid and development work done; that the said complaint asked that a receiver be appointed to care for the property, and also that he be authorized to sell all or such part of the property as should be found necessary to pay the indebtedness of the said defendant company, and also that the plaintiff be allowed to purchase the said property at a sale thereof; that although there was a pretended service of summons in this suit upon Henry C. McNutt as President, in Glens Falls, New York, there was as a matter of fact, no proper or sufficient service had on the defendant corporation; that there was no defense whatsoever made to the petition for a receiver; that on the 10th day of December, 1908, the court, Judge A. W. Frater of King County presiding, for and in the place of the said defendant, W. W. Black, signed an order appointing one John B. Fogarty temporary receiver, the said order reciting that it appeared that the complaint was duly served, and that no answer, demurrer or objections to the application for the receiver had been filed or made; that on the same day, on application of the receiver, the said Fogarty, an order was signed by Judge Frater that notice to creditors be given by publication to come in and file all claims with the receiver, on or before February 1, 1909, and that on or before February 3, 1909, said claims be filed with the Clerk of the Court for Snohomish County; that after the order appointing the temporary receiver had been made, one D. W. Locke, acting as attorney, claimed to enter his appearance for the defendant corporation, and thereafter entered into a stipulation with one John Sandige, acting as attorney for plaintiff, whereby it was agreed that the case should be tried on January 30th, 1909, before one F. E. Anderson as Judge pro tem; that the said Locke did not make a bona fide defense to said suit; that he did not investigate the merits of the case; that he did not know at the time who were the trustees of the defendant cor-

poration other than the said defendant Black; that he allowed one claim of the plaintiff to be presented uncontested, for the sum of Ten Thousand (\$10,000.) Dollars, which even the trustees of the defendant corporation had not allowed; that he made no investigation as to the merits of any other claims; that as a matter of fact the said D. W. Locke had no proper authority to act as attorney for the defendant corporation, Sunset Copper Mining Company; that the records of the said case show that the court found as facts that all the allegations contained in plaintiff's complaint are true, and further found as conclusions of law that the plaintiff is entitled to all the relief prayed for in his complaint; that there was no objection offered by said D. W. Locke to these findings; that judgment was entered in favor of the plaintiff against the defendant corporation for the sum of Thirty-seven Thousand Five Hundred One and seventy-five hundredths (\$37,501.75) Dollars; that the said judgment further ordered that plaintiff have a lien upon all the mining claims and other property of the said defendant corporation; that the said judgment further ordered that the said defendant corporation be adjudged insolvent, and that a permanent receiver be appointed, and that its assets be sold to pay this judgment; that this entire proceeding is null and void for the reason that no personal service was had on the defendant corporation, and that there was no service, or attempt at service, by publication; that all these proceedings were a part of the collusive and fraudulent scheme planned by and between the said defendants, W. W. Black and Frank L. Bell, whereby they intended to secure control of the property and assets of the said defendant corporation, for the purpose of converting the same to their own use and benefit; that the judgment herein rendered was procured solely through such fraud and collusion.

XVI.

That all the proceedings in this suit of Frank L. Bell vs. Sunset Copper Mining Company, case No. 9510, were had and taken in the Superior Court of the State of Washington, for Snohomish County, over which the defendant W. W. Black, was the duly elected and qualified presiding Judge; that he did not preside personally in said proceedings, but in pursuance of the fraudulent and collusive scheme, the said defendant W. W. Black called in certain Judges from various other counties to preside

at certain and different stages of the said suit and receiver's sale, as hereinbefore and hereinafter set out, to-wit: Judge A. W. Frater from King County, for the purpose of hearing the petition for the appointment of a temporary receiver, and for the purpose of signing an order for such receiver; Judge Lester Still, from Island County, for the purpose of hearing the petition for the order of sale of all the property of the said corporation, and the signing of said order of sale, as hereinafter set out, after the case had been tried before the said F. E. Anderson, as Judge pro tem, as hereinbefore set forth; Judge George A. Joiner, from Skagit County, for the purpose of hearing the application for an order confirming said sale, and the signing of said order, as hereinafter set out; that each one of these Judges was called in to preside at such different and distinct stages of the proceedings as to make it impossible for any one of them, while in the discharge of their duty, to discover the fraudulent and collusive scheme that was being carried on; that this plaintiff hereby disclaims any intention to reflect in any manner whatsoever upon the honesty, sincerity, or integrity of any one of the said Judges so presiding at the different stages of the said suit, but that they were so called in to act at such separate stages of the said suit by the said defendant, W. W. Black, in pursuance of, and in furtherance of the said collusive and fraudulent agreement between himself and the defendant, Frank L. Bell; that during all this time he was acting as one of the trustees, and as resident manager of the defendant corporation.

XVII.

That immediately after the securing of the said judgment for \$37,501.75, it was filed with the receiver as one of the claims against the said defendant corporation; that the said defendant, Frank L. Bell, also filed as a claim a judgment secured by him in the Circuit Court of the United States, for the Northern District of New York, in the case of Bell vs. Sunset Copper Mining Company, No. 3554, which judgment was for the total sum, including interest to December 8, 1908, of Twelve Thousand Seven Hundred Sixty-seven and Fifty-seven hundredths (\$12,767.57) Dollars; that the said defendant corporation was not doing business in the State of New York, and had not at any time complied with the laws of that state regulating

foreign corporations and giving such foreign corporations the privilege and right to do business in said state; that although there was a pretended service of summons in this suit, upon Henry C. McNutt, as President of the defendant corporation, in Glenn Falls, New York, there was as a matter of fact no sufficient service had on the defendant corporation, either personal or by publication; that there was no appearance or defense of any kind whatsoever made in said suit, and that said judgment was taken wholly by default, and wholly without service of any kind; that said judgment was secured through fraud and collusion, and is wholly void and of no effect; that it was and is an unlawful claim against the said defendant corporation, and should not have been allowed by the said receiver.

XVIII.

That the said defendant W. W. Black, filed a claim against the defendant corporation for a total of \$10,923.21, of which amount the sum of \$5,183.33 was claimed to be due him as salary for services rendered as general manager of the said defendant corporation, at the rate of \$100.00 per month, from July 20, 1903, to October 1, 1906, and from September 1, 1907, to November 15, 1908; that said claim was both illegal and exorbitant, and that said claim should not have been allowed by the said receiver.

XIX.

That although the total amount of claims filed was in excess of the sum of \$64,000.00, the petitioner of the receiver asking for a sale of the said property, sets forth that claims to the amount of only \$2,000.00 were filed with him within the time required by the said notice, and that the court had by an order of February 10, 1909, adjudged said claims to be valid and subsisting; that Lester Still, Judge from Island County, was called in by the said defendant Black to hear this petition; that after hearing the said petition, Judge Still signed an order of sale February 15, 1909, ordering the said property of the said defendant corporation sold, but that the receiver need require of the purchaser a payment of only \$2,000.00 cash.

XX.

That after the above mentioned order was entered, and prior to the sale, one D. Rudebeck, a minority stock-

holder, by his attorney, Milo A. Root, entered a motion to postpone the said sale until a complete and bona fide investigation could be made as to the validity of the claims that had been allowed, and until holders of stock not fully paid up shall have been required to make such payments; and until the books and records of the corporation could be brought from New York by an order of the court, and placed under the jurisdiction of the said court; that said motion was supported by an affidavit that he, the said Rudebeck, was the owner of more than 1,000 shares of the stock of the defendant corporation; that it was unnecessary to sell the said property; that there were other assets of the corporation sufficient to pay all indebtedness; that a large amount of the indebtedness was unjust and illegal; that the books and records had been for some years out of the state, contrary to the laws of the State of Washington, and that it was thus impossible to ascertain what those in charge of the affairs of the corporation had been doing during those years; that the receiver could not justly and legally adjust and preserve the rights of creditors and stockholders, nor could the court do so until said books, records and accounts were brought within the State of Washington, and within the jurisdiction of the said court; that there was a sufficient amount due from the holders of stock to more than pay all indebtedness of the corporation, and that the books and records, if brought within the jurisdiction of the court, would show this fact.

XXI.

That although the said D. Rudebeck asked that the receiver be directed to bring action against Ellen C. Baldwin for her unpaid portion of the capital stock so owned by her, or her assignee, the said defendant Frank L. Bell, the said receiver was not directed to do so, or at all; that the said receiver reported that the said Ellen C. Baldwin did not owe the corporation any sum; that said report was not based upon a bona fide investigation, or upon any investigation at all.

XXII.

That notwithstanding this motion and affidavit, the said property of the defendant corporation was sold at the West front door of the Court House of Snohomish

County, in Everett, Washington, on March 20, 1909; that at this sale, the said defendant, W. W. Black and Frank L. Bell, bought the entire property of the defendant corporation for the sum of \$2,000.00 cash and the cancellation of their claims against the defendant corporation; that at the time the said defendants, Black and Bell, bought this property at the receiver's sale, they were then acting as trustees of the said corporation; that in addition to acting as trustee, the defendant Bell was at the time of this sale, and had been for several years, the attorney for the said defendant corporation.

XXIII.

That thereafter, to-wit, on the 5th day of April, 1909, the said defendant Black called in Judge George A. Joiner, of Skagit County, to hear the application for an order confirming the said sale; that on the said 5th day of April, 1909, the said Judge Joiner, sitting for the said defendant W. W. Black, entered an order confirming the said sale to the said defendants, W. W. Black and Frank L. Bell; that this order and confirmation of sale was entered over the objections, supported by affidavits, of the said D. Rudebeck and one L. T. Reid, a minority stockholder.

XXIV.

That the said entire proceedings, from the time the said above mentioned suit of Frank L. Bell vs. Sunset Copper Mining Company, Case No. 9510, records of the Superior Court in and for Snohomish County, State of Washington, was instituted by the said defendant, Frank L. Bell, against the defendant corporation, were collusive and fraudulent; that the said defendants, Black and Bell, were both parties to such fraud and collusion; that they were both not only instrumental in securing such proceedings to be had and taken, but that they conspired and confederated one with the other for the purpose of conducting said suit, and for the purpose of converting the said property and assets of the defendant corporation to their own use and benefit and to the injury of this plaintiff; that so conspiring and confederating one with the other, they both not only had knowledge at all times, but actually directed the various steps taken in the proceedings which

resulted in the final sale of the property of the defendant corporation to them; that the said defendants, W. W. Black and Frank L. Bell, so conspiring and confederating, thus wrongfully and fraudulently attempted to become the co-owners, in consideration of the sum of \$2,000.00, and the cancellation of their collusive and fraudulent claims, of all the property, of every description both real and personal belonging to and owned by the said defendant corporation; that these properties are exceedingly valuable because the mining claims have standing timber thereon which expert timber cruisers value at not less than \$40,000.00 as the lowest estimate; that added to this amount is the very great value of the ore deposit thereon; that the price for which these properties were sold at the receiver's sale and purchased by the said defendant, W. W. Black, and the said Frank L. Bell, is absurdly low, and that the price so paid is not more than a nominal consideration therefor; that the said defendants, W. W. Black and Frank L. Bell, have made application for a United States patent to the said thirty-six mining claims described herein; that upon the granting of said patents by the United States Government, the said defendants, W. W. Black and Frank L. Bell, will become the apparent co-owners in fee simple of this entire property; that the value of the property in question will greatly exceed the sum of Forty Thousand (\$40,000.00) Dollars, all of which sum will be lost to the defendant corporation, and to its stockholders, if the said receiver's sale is allowed to be good, sufficient and valid.

XXV.

That ever since the transfer and assignment of the 1,250,000 shares of stock by the said Ellen C. Baldwin to the said Frank L. Bell, the said defendants W. W. Black and Frank L. Bell, have owned and controlled a majority of the outstanding stock of the defendant corporation, and that they have been ever since said time, and still are in the actual control of the said corporation; that so conspiring and confederating one with the other, they have operated and controlled the said defendant corporation solely for their own interests, and totally disregarded the rights and interests of the said defendant corporation, and the rights and interests of the minority stockholders, of which this plaintiff is one; that the said defendants, W. W. Black and Frank L. Bell, in pursuance of their purpose

to convert the property and assets of the said defendant corporation to their own use and benefit, not only carelessly mismanaged the said corporation, and clearly neglected their duties as trustees and officers thereof, but also committed numerous acts of willful misconduct and breaches of trust; that in pursuance of such purpose, and because of their gross negligence and willful misconduct, other fraudulent and willful misconduct was allowed to be committed by certain other officers and trustees of the said defendant corporation, Sunset Copper Mining Company; that such fraudulent and willful misconduct on the part of the said certain officers and co-trustees could have been prevented if the said defendants, W. W. Black and Frank L. Bell, had given proper and ordinary care and attention to their duties as trustees and officers of the said defendant corporation.

In Consideration Whereof, and for as much as your orator has no sufficient remedy at law for the wrong done and threatened to be done, and is only relievable in a court of equity where matters of this kind are properly cognizable and reviewable; and to the end therefore that the defendants may, if they can, show why your orator should not have the relief prayed, and may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of their remembrance, knowledge, information and belief, full, true, direct, and perfect answer make to the matters hereinbefore stated and charged, (but not under oath, an answer under oath being expressly waived), your orator prays that your Honors may decree that the proceedings had in the Snohomish County Superior Court in the case of Frank L. Bell vs. Sunset Copper Mining Company, be declared null and void and of no effect, and be set aside and cancelled; that the receiver's sale to the said defendants, W. W. Black and Frank L. Bell, under the proceedings in the said case, be set aside and cancelled; that a receiver be appointed to hold and take charge of all of the assets and property of the said corporation; that a bona fide investigation be made as to the merits of all claims against the said defendant corporation; that an accounting be had and taken of all the property and assets of every description owned by the said defendant corporation; that an accounting be had and taken of all moneys received and expended by the said defendants, W. W. Black and Frank L. Bell, during all the time or

times they acted as trustees or other officers of the said defendant corporation; that if necessary the property of the said defendant corporation, or such part thereof as may be necessary, be sold to pay the bona fide debts of the said defendant corporation; or

That the defendants, W. W. Black and Frank L. Bell, be enjoined and prohibited from making any sale, or contract of sale, for the said property, as owners thereof, with any person or persons, or corporation, whatsoever; and be enjoined and prohibited from any further use and benefit arising out of their apparent title to the said described property under the receivership sale; that the said defendants, W. W. Black and Frank L. Bell, be declared to be trustees for and in behalf of the said corporation and its stockholders, and be declared to hold all of the said property as trustees for the use and benefit of the said corporation, for its bona fide creditors and stockholders.

That your orator recover his costs and expenses in this action incurred, and that your orator may have such other and further relief as the equity of the case may require, and as to your Honors may seem equitable, proper and just.

May it please your Honors to grant unto your orator writs of subpoena of the United States of America, directed to the said Sunset Copper Mining Company, the said W. W. Black, and the said Frank L. Bell, and to such other defendants as shall, in the discretion of your Honors, appear necessary to the hearing and the termination of this cause, requiring and commanding them, and each of them, on a day certain to be determined by your Honors, to appear and answer to the several allegations in this bill contained, (but not under oath, answers under oath being hereby expressly waived), and to abide and perform such order and decree in the premises as to the court may seem proper and required by the principles of equity and good conscience.

O. C. MOORE,
GEORGE H. WALKER,

Solicitors and Counsel for the complainant, G. J. Buchler. Office and Post Office Address, 1601-3 Hoge Building, Seattle, King County, Washington, at which place service of all subsequent papers, except writs and processes, may be made.

5406. State of Pennsylvania, County of Philadelphia, ss.

Affidavit (Notary).

I, HENRY F. WALTON, Prothonotary of the County of Philadelphia and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following Certificate, do Certify, That Abram H. Smith, Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of deeds or conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, this 20th day of March in the year of our Lord one thousand nine hundred and twelve (1912).

HENRY F. WALTON,

(SEAL)

Prothonotary.

United States of America, Eastern District of Pennsylvania,
ss.

On the 20th day of March, 1912, before me, personally appeared G. J. BUCHLER, personally known to me, who having been first duly sworn, deposes and says:

That he is the complainant in the above entitled action; that he has read the above and foregoing bill of complaint; that he knows the contents thereof, and that the same is

true of his own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters, he believes it to be true.

(SEAL)

G. J. BUCHLER.

Subscribed and sworn to before me the day and year first above written.

(SEAL)

ABRAM H. SMITH,

Notary Public in and for the
State of Pennsylvania, resid-
ing at Philada. My commis-
sion expires Jany. 11, 1913.

Indorsed: Bill of Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 26, 1912. A. W. Engle, Clerk. By S. Deputy.

*United States of America. In the District Court of the
United States for the Western District of Wash-
ington. (In Equity).*

[Subpœna]

The President of the United States of America, to W. W. Black, Frank L. Bell and Sunset Copper Mining Company, a corporation, Greeting:

You are hereby commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the City of Seattle, on the 6th day of May, 1912, to answer a Bill of Complaint filed against you in said Court by G. J. Buchler and to do and receive what the Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness the Honorable C. H. Hanford, Judge of said Court, and the seal thereof, at Seattle, Washington, this 26th day of March, 1912.

(SEAL)

A. W. ENGLE, Clerk.

By

Deputy Clerk

MEMORANDUM PURSUANT TO RULE 12, SUPREME COURT, U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before the first Monday of May, 1912, next at the Clerk's office of said Court, pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

A. W. ENGLE, Clerk.

By F. A. SIMPKINS,

Deputy Clerk.

United States of America, Western District of Washington,
SS.

I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with W. W. Black personally at Everett, Western District of Washington, on the 27th day of March, 1912, and after due and diligent search I have been unable to find the within named Frank L. Bell and Sunset Copper Mining Company in this district.

JOSEPH R. H. JACOBY,

United States Marshal.

By LUDWIG FRANK, Deputy.

March 28th, 1912.

Fees: \$3.75.

Indorsed: Subpoena. Filed in the U. S. District Court, Western Dist. of Washington, Mar. 28, 1912. A. W. Engle, Clerk.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern
Division.*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

**Motion to Amend Bill of Complaint and Order Permitting
Amendment**

Now comes the complainant in the above entitled cause, and begs leave to file the following amendment attached hereunto, to the bill of complaint heretofore filed in this court on the 26th day of March, 1912.

O. C. MOORE,

GEORGE H. WALKER,

Solicitors and counsel for Com-
plainant, G. J. Buchler.

The above motion to amend, coming on to be heard before this court on the 2d day of December, 1912, and the court being fully advised in the premises, and it appearing to the court that the complainant is entitled to file said amendment, it is hereby

Ordered that the complainant in the above entitled cause be, and he hereby is granted leave, without cost, to amend the bill of complaint in the said action by filing the annexed amendment thereto.

Done in open Court this 13th day of December, 1912.

CLINTON W. HOWARD, Judge.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern
Division. In Equity.*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Amendment to Bill of Complaint.

Now comes the complainant, and by leave of the court first had and obtained, amends his bill in the following manner:

After the word "decree" on the 17th line of page 18 of the bill of complaint, strike out the words, "that the proceedings had in the Snohomish County Superior Court in the case of Frank L. Bell vs. Sunset Copper Mining Company, be declared null and void and of no effect, and be set aside and cancelled; that the receiver's sale to the said defendants, W. W. Black and Frank L. Bell, under the proceedings in the said case, be set aside and cancelled."

Also on the 3d line of page 19, strike out the word "or."

O. C. MOORE,

GEORGE H. WALKER,

Solicitors and counsel for
Complainant G. J. Buchler.

Indorsed: Motion to amend bill of complaint and order permitting amendment. Filed in the U. S. District Court, Western Dist. of Washington, Dec. 13, 1912. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the District Court of the United States, for the Ninth Circuit, Western District of Washington, Northern Division. (In Equity).

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING COMPANY, a Corporation, Defendants.

No. 2112

Answer of Defendant W. W. Black

To the Judges of the District Court of the United States,
For the Ninth Circuit, Western District of Washington,
Northern Division:

Now comes the defendant W. W. Black, and for his answer to the bill of complaint of the plaintiff, respectfully shows and alleges as follows:

I.

As to paragraph I of the bill of complaint, the said defendant admits that the said complainant is a resident of the State of Pennsylvania, but this defendant has no information as to whether or not the said complainant is a citizen of the United States or a citizen of Pennsylvania and therefore denies the same.

II.

That said defendant admits the allegations in paragraph II, III, IV, V, VI, VIII, XX and XXIII of said complaint.

III.

As to the allegations contained in paragraph VII, the said defendant admits that the plaintiff is now and at all of the times since the year 1902, been a stockholder of the defendant corporation, owning and holding 58,250 shares of capital stock thereof; but this defendant denies that said suit was brought without collusion for the purpose of con-

ferring jurisdiction in a Court of the United States, and this defendant denies that this action is brought in good faith.

IV.

That as to paragraph IX of said complaint the defendant admits that he was a trustee of the Sunset Copper Mining Company, from about the year 1900 or 1901 and up to, including March 1909, and that from about said year 1901 the said defendant was resident manager of said corporation, but this defendant denies that since March 1909 that he has been acting as either trustee, or as manager or assumed so to act.

V.

That as to paragraph X of said complaint, this defendant admits that the principal place of business of said Copper Mining Company was in Everett, Washington, and admits that the corporate books of record, to-wit: The stock books and certificates of stock and minute books were permitted by this defendant to be taken from the State of Washington, and were sent to Glens Falls, State of New York; but this defendant alleges that said minute books, stock books were sent to New York at the request of the President of said company, for the purpose of enabling the president to examine the same and that the same were kept for some time and finally returned to the office at Everett, Washington; this defendant alleges that said books were sent to New York for temporary purposes only; the said defendant denies that any other papers, except the minute books and blank certificates of stock were sent out of the State of Washington or permitted to be taken from the State of Washington; that as to the allegations contained in said paragraph, that these books were not available or open to inspection; this defendant has no knowledge as to whether they were open to inspection in New York and therefore denies that they were not open to inspection; the defendant denies that the taking of said books out of the State of Washington was contrary to the laws of said State, and defendant admits that the minute books and blank certificates of stock were sent to the State of New York with the assent of said W. W. Black and said Frank L. Bell.

VI.

The said defendant answering paragraph XI of said complaint admits that the capital stock of the defendant corporation was increased to Two Million shares, but denies that W. H. Baldwin became the owner and holder of a majority of the stock so issued or any stock in excess of One Hundred Thousand shares, and admits that the principal value of said stock was One Dollar per share; and denies that the defendant corporation sold to W. H. Baldwin any shares of stock at Two and one-half cents per share; or that John E. McManus, the Secretary-Treasurer of the defendant corporation, sold stock to W. H. Baldwin; the said defendant admits that about the 7th of October, 1903, the capital stock of said defendant corporation was increased to Three Million shares, but denies that the same was done contrary to law, but on the contrary alleges that said increase was made in compliance with the laws of the State of Washington, and alleges that notice was duly given the stockholders of the meeting called for said purpose provided by law; the defendant admits that said One Million shares, was of the par value of One Dollar per share and the said defendant denies that said W. H. Baldwin became the owner and holder of any of the shares of said stock in excess of Twenty-five Thousand shares; that whatever shares the said Baldwin did obtain from the company he paid the said corporation at the rate of Ten cents per share; the defendant admits that the said W. H. Baldwin held all the stock issued to him until his death, about the year 1907 but denies that the defendant at the time of his death was the holder of One Million Two Hundred Fifty Thousand shares of stock or any number of shares exceeding One Hundred Seventy-five Thousand shares; the defendant alleges that the said W. H. Baldwin acting as agent for his wife, Ellen C. Baldwin, purchased Two Hundred Thousand shares of the increase, authorized on or about the 7th day of October, 1903, and that the said Ellen C. Baldwin paid Two and one-half cents per share for said stock and that she also obtained from John E. McManus, Secretary-Treasurer of defendant corporation, at or near the same time, a large number of shares of stock, approximately Five Hundred Thousand shares, at the rate of Two and one-half cents per share and that the remaining shares of said One Million Two Hundred and Fifty Thousand shares of stock, men-

tioned in said paragraph XI, was purchased from various stockholders, including Egbert brothers, which stock had been previously issued by said company for a valuable consideration to the said stockholders; the said defendant alleges that said stock was sold at the market value of said stock at said time; the said defendant alleges that the said stock could not be sold to any other person at as high a price as so paid by Ellen C. Baldwin, and that the company had no other means of obtaining money to pay its debts and to develop its property and that it could not have sold its stock to any other person than to Ellen C. Baldwin for as much as Two and one-half cents per share and that such sale of Ellen C. Baldwin was for the best interests of said company, and was made in the utmost good faith by the trustees of said corporation; the defendant alleges that at the time of the sale of Five Hundred Thousand shares aforesaid, to Ellen C. Baldwin, the trustees of said defendant corporation gave the said W. H. Baldwin an option to purchase Five Hundred Thousand shares of said last increase of One Million shares at the price of Ten cents (10c) per share, but that said W. H. Baldwin did not fully use his option to purchase said stock, but that he did purchase a few shares, not to exceed Twenty-five Thousand shares at said price of ten cents per share and the defendant alleges that whatever other stock the said W. H. Baldwin owned or had at the time of his death, was obtained from other stockholders, not mentioned in said complaint, none of which was purchased from said company; the defendant admits that the said W. H. Baldwin and Ellen C. Baldwin, his wife, owned more than a majority of all shares of stock issued and outstanding.

VII.

That as to paragraph XII of said complaint this defendant denies that the said defendant and said Frank L. Bell or W. H. Baldwin, or each, all or any of them conspired and federated with each other, or with the said W. H. Baldwin and Henry C. McNutt, or any other persons or any of them for the purpose of defrauding the minority of the stockholders of said corporation or for the purpose of manipulating or handling the business of said corporation so as to throw the same into insolvency or for the purpose of converting the assets of the said cor-

poration to their own use and benefit and to the injury of the plaintiff or any other person and denies that they did anything for the purpose of injuring the corporation or any of its stockholders or to gain any benefit whatever, except to increase the value of all of the stock of said corporation, either between the years 1902 and 1906 or at any other time, but on the contrary said defendants allege that every act they did in connection with said corporation, was to protect the interests of the minority stockholders and every other stockholder and for the purpose of advancing the interests of said corporation; the said defendant admits that the notes described in said complaint were signed by the defendant corporation in favor of Ellen C. Baldwin, who was the wife of W. H. Baldwin, and that the mortgages described, were executed, but denies that said notes or mortgages were executed without any consideration whatever, but said defendant alleges that the said corporation received cash to the amount of notes mentioned and that said cash was actually expended by said company under the direction of this defendant in developing the property of the said company to the best of his ability and under the direction and by the authority of the Board of Trustees of said defendant corporation; that said money was used in making improvements upon the property of defendant corporation described in the complaint and that all of the said money was used in making improvements in said company, and that all of said improvements were made upon the advice and direction of skillful mining engineers and was made honestly for the interest of the company and that the consideration for the execution of said notes and mortgages was actual cash to the full amount of the sums mentioned in the said several notes and this defendant denies that they were any collusive or fraudulent actions on the part of the said defendants or by any of them; and this defendant alleges that at all times herein mentioned with reference to the transactions complained of in the complaint, the said defendant acted according to his very best judgment in the interests of all of the stockholders of said company and in the interests of said company having an earnest purpose at all times to promote the interests of said company and its stockholders and the said defendant alleges that at all of the times the other trustees acted in the same manner so far as known to this defendant; said defendant admits that the persons named in said paragraph were acting as trustees and

alleges that all notes, except one for \$4263.60 and one for \$4649.50 were executed in Everett, Washington, and admits that the others were executed in New York; defendant alleges that the mortgage dated December 31, 1904, was executed in Washington and the other mortgage was executed in New York.

VIII.

That as to paragraph XIII of said complaint, said defendant admits that the annual meeting of the stockholders was held in his office as alleged in said complaint, and admits that the persons named in said paragraph were elected trustees, but denies that same was in pursuance of any conspiracy or was made for any fraudulent purpose and that the said defendant admits that said persons were elected by votes of proxy held by this defendant, together with other stockholders voting personally and that a majority of said trustees were then residents of Glens Falls, New York.

IX.

That as to paragraph XIV the said defendant admits the death of said Baldwin and that One Million Two Hundred Fifty Thousand shares of stock of said defendant corporation was in the name of Ellen C. Baldwin; that said stock, notes and mortgages were sold and assigned to Frank L. Bell, who was the counselor and attorney at law of the said Ellen C. Baldwin and W. H. Baldwin in his life time and this defendant believes that the said Frank L. Bell had full knowledge as to the notes and mortgages therein mentioned, but this defendant admits that the said Frank L. Bell had full knowledge as to the notes and mortgages therein mentioned, but this defendant denies that the said Frank L. Bell had any knowledge that the claims assigned by Ellen C. Baldwin were collusive or fraudulent, but admits that the said Bell knew the amount of stock so transferred was a majority of all of the stock issued and outstanding, and knew that he would be able to control the said defendant corporation, and this defendant denies that said purchase was made to further that fraudulent purpose or any fraudulent purpose whatever, or for the purpose of injuring any stockholders.

X.

That as to paragraph XV the said defendant denies any conspiracy or confederating of said defendant and the said Frank L. Bell at any time, for the purpose of converting the said assets of the defendant corporation for the use and benefit of said defendants Black and Bell or either of them; and further answering paragraph XV of said complaint, this defendant admits that a suit was brought in the Superior Court by Frank L. Bell against the Sunset Copper Mining Company, being cause No. 9510, and that it was alleged that the defendant corporation was insolvent, and that its debts were more than \$40,000.00; that it had no cash and that the mining claims were very valuable, and that the mineral claims so owned would be forfeited if the assessments were not paid, and that the plaintiff asked that a receiver be appointed with authority to sell the property, pay the debts and to purchase the property at a sale thereof; and alleges that the said Henry McNutt was served with a summons and that a hearing was had in said case by the Court, Judge A. W. Frater of King County presiding, and that the order was made in said case as alleged and that said order was signed as alleged by said Judge Frater; said defendant alleges that D. W. Locke was employed by the Sunset Copper Mining Company as its attorney and did put in his appearance for the defendant and duly entered into stipulation, whereby it was agreed that the case should be tried on January 30th, 1909, before F. E. Anderson, as Judge pro tem., and said defendant admits that the records of said case show that the Court found that all the allegations of the plaintiff's complaint were true and made conclusions of law as stated in said paragraph, and that there was no objection offered by D. W. Locke to these findings and the judgment was entered as stated therein, and admits that there was no service by publication, but this defendant alleges that there was no valid defense possible and alleges that said D. W. Locke examined the notes, mortgages and papers, and found that there was no legal valid defense and that this defendant was made a witness in said case and said Locke examined him as to the execution and as to the consideration, all of which was done before the Court; and said defendant denies that no proper or sufficient service had been made on the defendant corporation, but alleges on

the contrary that the service was actually made on Henry C. McNutt in Glens Falls, New York; the said defendant alleges that he was the general manager of said corporation and was the only trustee at said time residing in the State of Washington and that D. W. Locke was employed as attorney for said company with the instructions to look after the interests of said corporation, and that this was done in the utmost good faith; the said defendant admits that an order for notice to creditors was made as stated in said paragraph and that Judge A. W. Frater signed an order appointing John B. Fogarty temporary receiver and that the said Judge Frater was acting instead of this defendant and admits that said order contained the recitations stated in said paragraph and that notice to creditors was ordered by Judge Frater, as stated in said paragraph and that D. W. Locke, acting as attorney, claimed to enter his appearance for the defendant corporation as stated in said paragraph and entered into the stipulations mentioned in said paragraph, but denies that said Locke did not make a bona fide defense to said suit and that he did not investigate the merits of the case, but alleges on the contrary that he did so; the said defendant denies that said D. W. Locke had no proper authority to act as attorney for the defendant corporation, but on the contrary alleges that he was duly authorized to act as attorney for said corporation; said defendant admits that the records of said case show that the Court made findings of facts and conclusions of law, as stated in the said paragraph and admits that there was no objection offered by said Locke and that judgment was entered, as stated in said paragraph, but denies that said proceeding is null and void for the reason set forth in said paragraph, or for any other reason and denies that there was any collusive or fraudulent scheme of any kind between the said defendants and denies that judgment mentioned, was rendered or procured through any fraud or collusion; the said defendant further alleges that at the time of the commencement of said action in the Superior Court of Snohomish County, being numbered 9510; a copy of the summons and complaint was duly served upon H. C. McNutt, who was then the President of the Sunset Copper Mining Company; that said service was made in the State of New York, and at the said time the said H. C. McNutt made an acknowledgement in writing as follows, to-wit: "The above named defendant by H. C. McNutt, the presi-

dent, does hereby acknowledge due and timely service of the foregoing summons and complaint. Dated November 30th, 1908. H. C. McNutt, President of Sunset Copper Mining Company, a corporation.", which written acknowledgement was attached to the summons and complaint in said action numbered 9510; and said defendant alleges that all of his actions in connection with any of the proceedings mentioned in said paragraphs were done in good faith and for the purpose of serving the interests of all of the stockholders of said corporation.

XI.

That as to paragraph XVI of said complaint, the said defendant admits that all the proceedings mentioned in the suit in said paragraph were had in the Superior Court of the State of Washington for the County of Snohomish, over which this defendant was the presiding Judge, and admits that he did not preside personally in said proceedings; the said defendant admits that he called in those certain Judges mentioned in said paragraph, from various Counties to preside at said time and different stages of said suit and receiver's sale and that Judge Frater of King County, Washington, was called in for the purpose of hearing the petition and for the appointment of temporary receivers and for the purpose of signing an order for such receivers and that Judge Lester Still from Island County, was called in for the purpose of hearing the petition for the order of sale of all of the property of said corporation and the signing of said order of sale after the case had been tried before F. E. Anderson, as Judge pro tem and that Judge A. Joiner from Skagit County, was called for the purpose of hearing the application for an order confirming said sale and deciding of said order, but this defendant denies that said Judges were called in, in pursuance of any fraudulent or collusive scheme or for the purpose of preventing the Judges from discovering any fraudulent or other scheme; and this defendant alleges that all of these things were done without the actual knowledge of said Frank L. Bell and done only for the reason that it was more convenient to get these Judges than others by reason of the fact that the Judges were difficult to get and the defendant alleges that the several Judges, aforesaid, were made fully cognizant of the facts and circumstances in connection with said case, and admits that this defendant was a trustee and manager of said defendant corporation.

XII.

That as to paragraph XVII of said complaint this defendant admits that after the securing of the said judgment for \$37501.75 it was filed with the Receiver as one of the claims of said defendant corporation and that said defendant Frank L. Bell filed as a claim a judgment secured by him from the Circuit Court of United States for the Northern District of New York for the sum of \$12,767.57 as alleged in said paragraph, but as to whether the said defendant corporation had not complied with the laws of New York regulating corporations, this defendant has no information and therefore denies the same and this defendant admits that a service of summons was made upon Henry C. McNutt as President of defendant corporation in Glens Falls, New York, but alleges that said McNutt admitted in writing due and timely service of summons and complaint, but as to whether there was publication of summons or appearance or any defense of any kind in said suit and as to whether said judgment was taken by default, this defendant has no information and therefore denies the same; this defendant denies that said judgment was secured through fraud and collusion and denies that it was an unlawful claim against said defendant corporation, and denies that said judgment was void and denies that said claim should not have been allowed by said receiver.

XIII.

That as to paragraph XVIII of said complaint this defendant admits that he filed a claim against the defendant corporation for a total of \$10,923.21 of which amount the sum of \$5,183.33 was claimed to be due as salary for services rendered as general manager and as secretary of said defendant corporation at the rate and for the time mentioned in said paragraph, but denies that the said claim was illegal or exorbitant or that said claim should not have been allowed by said receiver, but on the contrary alleges that the said claim was proper and legal and that the said defendant had been employed by the Board of Trustees of said defendant corporation to act as secretary and general manager of said corporation and that he faithfully performed his duties as such and that the amount

claimed was reasonable and just and that the other part of said sum of \$10,923.21 was for money actually advanced by this defendant.

XIV.

That as to paragraph XIX said defendant admits that the total amount of claims filed was in excess of \$64,000.00 and admits that one petition of the receiver set forth that claims to the amount of \$2,000.00 were filed with him within the time required by the said notices, but alleges that in another report he showed that claims in excess of \$64,000.00 had been filed and alleges that same were by the court adjudged to be valid claims and admits that the court had by its order mentioned in said paragraph adjudged claims to be valid and subsisting; this defendant admits that Judge Lester Still from Island County was called in by this defendant to hear the petition and that after said Lester Still had heard said motion he signed the order mentioned in said paragraph and admits that by such order, said receiver was only required to require a payment of only \$2,000.00 cash and alleges that said order provided that the remaining of the bid could be paid by the claims proved before said receiver; this defendant alleges that the reason for requiring payment of cash was to have a sufficient amount of cash on hand to pay the receiver and the costs and expenses of the receiver-ship and of such sale.

XV.

That as to paragraph XXI, this defendant admits that the said E. Rudabeck requested that the receiver be instructed to bring an action against Ellen C. Baldwin for the unpaid portion of the capital stock so owned by her or her assignee Frank L. Bell; this defendant admits that said receiver was not directed so to do; and this defendant admits that said receiver reported that the said Ellen C. Baldwin did not owe the said corporation any sum and this defendant denies that said report was not based upon a bona fide investigation or upon any investigation at all, but alleges that the said receiver secured information as to the condition of affairs and as to the conditions of the estate of Ellen C. Baldwin, and he re-

ported in open court to the Judge that there was no legal claim of said corporation against Ellen C. Baldwin.

XVI.

That as to paragraph XXII of said complaint, said defendant admits that said property was bid in by the said Black and Bell and admits that the entire property of defendant corporation was purchased for the sum of \$2,000.00 cash and the cancellation of \$38,000.00 of claims against the defendant corporation, but denies that the remaining portion of the claims were cancelled; this defendant admits that he was at the time of receiver's sale a trustee of said corporation, but denies that Frank L. Bell was a trustee at that time, and denies that defendant Bell had been for some years attorney for said defendant corporation, but alleges that said defendant Bell had been during the life of W. H. Baldwin the attorney for said corporation, acting for it about all matters in the State of New York.

XVII.

That as to paragraph XXIV this defendant denies that there was any collusive or fraudulent action between the said defendant and Frank L. Bell, and denies that they were parties to any fraud or collusion of any kind whatsoever, the said defendant admits that he had knowledge of all the steps taken in connection with said suit and of the various steps taken in the proceeding in the sale of the property of defendant corporation to them but denies that they wrongfully or fraudulently became the coowners, but admits that in consideration of the sum of \$2,000.00 in cash and cancellation of their claims amounting to \$38,000.00, all of the property of said defendant corporation were conveyed to the said Black and the said Bell; this defendant admits that the properties are valuable and a number of said claims have standing timber thereon, but has no knowledge whether expert timber cruisers valued the same at no less than \$40,000.00, or at any sum and therefore denies the same, but denies that the price for which the properties were sold at the receiver's sale and were purchased by said Black and Bell was absurdly low, but alleges that on the contrary the bid for said sale

was more than could be obtained for said property at any time since said sale and alleges that said sum of \$40,000.00 was more than the market value of said property was at said time or has been at any time since said time; the said defendant denies that said Frank L. Bell had any definite knowledge as to the several stages taken in said action, but alleges that he was informed in a general way of the results of said proceeding and as to how the proceedings were progressing; said defendant admits that the said Black and Bell have made application for United States Patent and the said defendant will become the apparent co-owners, in fee simple of this entire property, but denies that the value of the property in question will exceed the sum of \$40,000.00.

XVIII.

That as to paragraph XXV, this defendant admits that the said Black and Bell have owned a majority of the outstanding stock of the defendant corporation and are now the owners of the same, but denies that they conspired and confederated together solely for their own interests and disregarded the rights and interests of said defendant corporation, but alleges on the contrary, that this defendant was careful to regard all the rights and interests of the minority and other stockholders and the said defendant denies that the said property was carelessly mismanaged and denies that they neglected their duties as trustees and officers thereof and denies that they committed any misconduct or breaches of trust and denies that any fraud and misconduct was allowed to be conducted by other officers of said company; but alleges on the contrary that both the said Black and Bell did all they could to manage the business of said corporation wisely and honestly, and this defendant alleges that he was particularly careful at all times to look after the interests of said corporation, and that he did so until it was impossible to raise any money in any way to pay the debts of said corporation or to develop said property and alleges that at all times he was anxious to and did look after the interests of the minority stock of said corporation and endeavored to obtain money in every possible way, with which to improve the property and to pay its debts.

XIX.

For a separate and further defense the said defendant alleges that one N. Rudebeck, a minority stockholder of said Sunset Copper Mining Company, entered a motion to set aside the sale of the property of said company by said receiver, as alleged in the bill of complaint herein. That said motion was made in behalf of himself and all other stockholders and was denied by the court about the month of March 1909, and said order was not appealed from and in unreversed and the decision thereon is *res judicata* thereon and binding upon the complainant in this suit and by reason thereof plaintiff cannot maintain this suit, nor can he attack said order by this, a collateral action; and said defendant further alleges that after the sale of said property by the receiver of said Court, N. Rudebeck and other stockholders appeared in said court and objected to the confirmation of such sale, objecting and alleging substantially the allegations contained in the complaint in this action, and the court duly heard the same, passed upon the same, and overruled their objection and confirmed said sale, all of which was done in the Superior Court of the State of Washington, in and for the County of Snohomish, being the court in which the receiver has been duly appointed and in which said proceedings were duly pending, and by reason of the foregoing, the matter is *res judicata* and this plaintiff cannot maintain this suit nor attack said order by this, a collateral action.

XX.

For a separate and further defense herein, defendant alleges that now, and at the time plaintiff's alleged cause of action arose and accrued, the laws of the State of Washington, in substance, provided "The Superior Court in which a judgment has been rendered or by which or the Judge of which a final order has been made, shall have power, after the time at which said judgment or order was made, to vacate or modify such judgment or order for fraud practiced by the successful party in obtaining the judgment or order upon a petition filed in the original case within one year after the judgment or order was made." That this suit is not a petition in the original case and was not commenced within one year after the rendition of said judgment and the

taking and filing of said order under the laws of the State of Washington, the alleged cause of action set out in the complaint herein is barred by the Statute of Limitation and plaintiff has no right to maintain the same.

XXI.

As a separate and further defense herein, defendant alleges that now and at the time plaintiff's alleged cause of action arose and accrued, the laws of the State of Washington, in substance provided, "That actions for relief upon the ground of fraud must be commenced within three years after the cause of action thereon shall have accrued," and the alleged cause of action set forth in the complaint accrued more than three years before the time of the commencement of this suit by plaintiff; that plaintiff knew of the taking of said judgment and order at the time of the taking of each thereof and at and from such time has had full knowledge of all of the same and of all the matters alleged in the complaint herein, and this suit is barred by said limitation statute.

XXII.

As a separate and further defense herein this defendant alleges that at the time plaintiff's alleged cause of action arose and accrued the laws of the State of Washington in substance provided and ever since said time have provided and do now provide that for any of the matters complained of in the complaint, action shall be commenced within two years after the cause of action shall have accrued; that Section 165 of Remington & Ballinger's Annotated Codes and Statutes of Washington provides that an action for relief not hereinbefore provided for shall be commenced within two (2) years after the cause of action shall have accrued, and defendant further alleges that complainant is seeking to have the defendant W. W. Black declared a constructive trustee of said property on the ground that he was a director of said company when he purchased the property at said receiver's sale, and defendant alleges that such a proceeding is an action for relief not otherwise provided for in the laws of Washington, and that it therefore falls within Section 165 of Remington & Ballinger's Code above cited;

that the alleged cause of action set forth in the complaint did not accrue within two years next before the commencement of this suit by plaintiff, and that the plaintiff knew of all of the facts set forth in the complaint and had full knowledge of the same at all the times mentioned in the complaint herein and this suit is barred by said limitation statute.

XXIII.

That said complainant was guilty of laches in bringing his alleged cause of action and that his alleged cause of action and bill of complaint is stale; that said complainant knew of the acts and transactions alleged in his complaint at or about the time of their happening; that said complainant had knowledge of the increase of capitalization of said corporation of the sale of stock to said Ellen C. Baldwin and to said W. H. Baldwin and of the terms of sale, of the giving of the notes and mortgages to Ellen C. Baldwin, of the bringing of the foreclosure suit in Snohomish County, of the receivership of said corporation, of the sale of said property, of the objections filed by said Rudebeck, of the confirmation of the sale to said Black and Bell, and that said Black was a trustee at the time of the purchase, and of the other transactions at or about the time they occurred; that said complainant knew the defendants were expending funds after the purchase for the development and patenting of said property; and defendant further alleges that all the court proceedings of Snohomish County, alleged in said bill of complaint were duly recorded as provided by law, in the County where said mining property is situate, and that said complainant had constructive knowledge as well as actual knowledge of said transactions; and this defendant alleges that if complainant had any cause of action against the defendant herein, he should have brought same before defendants Black and Bell had expended large sums of money in holding the property as alleged herein; that there is no valid excuse for the delay of said complainant and that even if complainant ever had a cause of action, which this defendant denies, that his delay had prejudiced and injured this defendant; this defendant alleges that complainant's cause of action is barred by inexcusable delay and laches.

XXIV.

For a separate and further defense, herein, this defendant alleges, that the Court is without jurisdiction to hear and try this cause, for the reason that it appears upon the face of the bill that this suit is brought by plaintiff for the benefit of the Sunset Copper Mining Company, a corporation of the State of Washington. That an action therefor must be brought by said Company and can only be brought by a stockholder thereof, after such stockholder has demanded that such Company bring action, and upon its refusing to do so and that complainant herein has never demanded of said corporation that it bring this action.

XXV.

That previous to the month of May, 1908, the said Ellen C. Baldwin had loaned said Sunset Copper Mining Company, money, for which said Company gave its notes as follows:

One dated November 3rd, 1903, payable in one year from the date thereof, for	\$ 5,000.00
One dated November 13th, 1903, payable in one year from the date thereof, for.....	1,000.00
One dated November 20th, 1903, payable on demand for	1,000.00
One dated November 27th, 1903, payable on demand for	3,000.00
One dated February 8th, 1904, payable on demand for	5,471.00
One dated February 8th, 1904, payable on demand for	5,000.00
One dated September 17th, 1904, payable on demand for	4,649.50
 Total.....	 \$29,384.10

That all of said notes represented actual cash advanced by her to said Company and substantially all of the money advanced to said Company and represented by said notes actually passed through the hands of this defendant, who had knowledge thereof. All of said money was advanced by her to pay debts of said company, install machinery and mining equipment and to do the assessment work to hold said company's mining claims and, to the knowledge of this defendant substantially all of said money was expended by this defendant solely and wholly for the use and benefit of the said Sunset Copper Mining Company and was expended honestly to further the interests of the said Sunset Copper Mining Company and to improve its property to the best of the ability of the said defendant, and said defendant alleges and he is informed and believes and therefore alleges to be the fact that all of the said indebtedness was for a good and valuable consideration assigned to Frank L. Bell, his co-defendant. Said defendant alleges that all of the money not used for actual improvements upon said property, was expended for necessary expenses connected with the business of said corporation and was inconsiderable in amount.

XXVI.

That the complainant herein after the assignment of the indebtedness to Frank L. Bell persistently threatened to bring suit charging fraud and finally came to the City of Everett at one annual meeting, in January, 1908, and threatened that if he were not elected a director of said company that he would bring suit alleging fraud and would thereby annoy the company so that defendant could not raise any money; that he informed this defendant that he had so notified Frank L. Bell that he would do the same and that Frank L. Bell had instructed him that the whole matter lay in his hands and that he could elect him if he desired so to do. Previous to said meeting the holders of a large majority of the stock of the Sunset gave this defendant proxies authorizing him to vote for said complainant as a director or trustee in said Sunset Copper Mining Company if he deemed it advisable so to do; that at said meeting said de-

fendant notified said complainant that he believed that his sole purpose was to annoy the company and make himself such a nuisance as to compel the buying of complainant's stock by persons interested in said company, and that for those reasons he did not think it advisable to have him made a trustee or director, and thereupon refused to vote for him, but the said complainant was given access to the use of books and accounts of said company with the assistance of a clerk, to-wit, Ralph C. Bell, now one of the Judges of the Superior Court of Snohomish County, Washington, and he did go over the books and accounts and affairs of said company and did go upon the property of said company and examine the improvements thereon and became fully and absolutely acquainted with all of the affairs of said company, and thereupon expressed himself as being satisfied that the affairs of said company had been properly and rightly managed; that he thereafter desired to obtain the interests of Baldwin and Frank L. Bell in, to and concerning their indebtedness mentioned in said complaint and in this answer, and all of the stock in said company of said Baldwin and Bell and endeavored to raise the money to purchase said property and obtained a written option for the same, but failed to obtain the money. That at said time the said defendant notified said complainant that there was great danger of this indebtedness being pushed and judgment obtained and the property sold and discussed with him the best methods of avoiding the same; that this defendant alleges that said complainant was fully and absolutely informed at that time by an examination of the books and by seeing the improvements made upon said property and knew absolutely that all of the allegations except as admitted by this defendant were false, and this defendant alleges that this suit is brought for no other purpose than to annoy the said defendants and to hinder and delay the said defendants in improving, developing or disposing of said property, and that complainant is acting in connection with stockholders residing in this state and brings this suit in his own name for the purpose of giving this Court jurisdiction.

XVII.

That soon after the said Frank L. Bell had become the owner of said notes, mortgages and other claims of said Ellen C. Baldwin, that said Frank L. Bell notified this defendant that he was going to proceed to foreclose the mortgages and to collect his indebtedness because he did not believe that the company could or would pay the same and it was necessary for him to bring such action; that this defendant went to the City of New York and met the said Frank L. Bell and went over the whole situation with him and urged him to give the company time, this defendant believing at said time that if reasonable time were given that some one could be procured to purchase the interest of said Frank L. Bell and who would furnish necessary money to the company to develop the property of said company; that this defendant so informed Frank L. Bell, but said Frank L. Bell then notified this defendant, who was then acting in the interests of said company, that he did not believe that money could be procured and that in order to protect his interest money should be advanced by him from time to time in order to do the assessment work upon said property and to obtain patents from the United States government for the land contained in said claims, and thereupon refused to extend the time any longer; that this defendant, believing at said time that if the foreclosure of said mortgages could be delayed that money might be procured by means hereinbefore mentioned and that it was to the interest of all the stockholders of said company that said suit to foreclose be not brought, finally entered into an arrangement with the said Frank L. Bell that this defendant personally would advance to said company for the purpose of protecting the interests of said company, one half of the necessary money to do the assessment work and one-half of the necessary money to apply for patents upon said land at such time as might be deemed advisable on condition that the said Frank L. Bell would delay the prosecution of said actions for a reasonable time, the time then not being agreed upon, and that said Bell should advance one-half of said money; that said defendant continued from time to time to advance money and when the said Bell concluded that a reasonable time had elapsed, this defendant continued to urge him to grant further delay, but

all of said time the said Bell was impatient and expressed himself as believing that the property itself was not worth the amount of the indebtedness, and it would be necessary at some time to foreclose said mortgages and that the sooner it was done the better for all concerned; that this defendant at the time of making the agreement aforesaid, informed the said Frank L. Bell that a great many people owned stock in the company and that while this defendant was under no legal or moral obligation to protect them except that he was a trustee in said company, yet a great many people of them were his personal friends and he desired to protect them in every way possible; that he informed the said Frank L. Bell that if he pushed said action without granting a reasonable time to see what could be done about protecting said interests that he would resort to every expedient in his power to delay said action and to prevent the sale of said property; that thereupon at the request of said defendant it was agreed between Frank L. Bell and said W. W. Black that if at any time said Frank L. Bell brought proceedings to foreclose said mortgage or to collect the amounts due to him from said company and if the property were sold and it did not bring at such sale more than the indebtedness against said company and it was necessary to bid in said property by said Frank L. Bell that the property was to be bid in in the name of said Bell and this defendant, and that all persons who held stock in said company, if they desired so to do upon payment of their share of the indebtedness in proportion to the amount of stock held by said stockholder were to participate in the proceeds that might be derived from the sale or disposal of said property to the same extent and in the same proportion as said Bell and this defendant should receive out of the proceeds of said property; that during the year 1908 after consultation with this defendant said Frank L. Bell, as this defendant was informed and believes, offered to the stockholders of said company that if they would bear their proportionate expenses of caring for said property and obtaining patents on said land that said Bell would forego the foreclosure of said mortgages for a reasonable time to enable all parties interested to determine whether it were possible to obtain money to develop said property; that although he made an appeal to all the stockholders of said company, the total amount of promises to furnish financial assistance amounted to less than One Hundred Dollars; that thereupon said Bell became impatient and insisted that he would foreclose said mortgages and proceed to collect his indebtedness;

that as part consideration for the extension of time by the said Frank L. Bell as aforesaid, said Black, acting for himself and as trustee of said company had agreed that if said Bell delayed his prosecution of said suit for a reasonable time and that this defendant was satisfied that he had delayed the same for a reasonable time and had given the company opportunity to raise money to develop said property; that this defendant would interpose no frivolous objection and would not unnecessarily delay him in the collection of said debt and would use all lawful and reasonable means to prevent expense in the foreclosure of said action; that during all of said time this defendant had used every means within his power to raise money in behalf of said company and had failed to secure any money whatever; that after the arrangement hereinbefore mentioned all money was advanced by said Bell and said Black to said company and no one stockholder or other person contributed any money to protect the interests of said company and that this defendant became satisfied that it was impossible for either him or said company to raise any money or to develop said property or to do anything that would get enough money to pay the indebtedness of said company and that the action brought in the Superior Court of the State of Washington in and for Snohomish County by said Frank L. Bell to have a receiver appointed was proper and necessary; that the company was entirely insolvent, could not pay its debts, had no means by which it could do so, and that further delay was of no advantage to either the stockholders of the company or to any person connected in any way with said affair. That this defendant alleges that said action was brought and all proceedings had honestly and without any fraud and with the very best intentions of protecting everybody connected with said company; that as a result of the said proceedings the said property was advertised by the receiver and at said receiver's sale was bid in in the name of Frank L. Bell and W. W. Black so as to fully carry out the agreement hereinbefore mentioned, and for the reason that there were no other persons or person who would bid anything like the amount of the indebtedness against said property; that thereafter this defendant caused to be published in the papers in Everett, Washington, a notice that such sale had been made and had been duly confirmed and that all stockholders in said company could pay their proportionate share of said indebtedness and be allowed to participate in the proceeds that might be derived from said property to the

same extent and in the same manner as the said Bell and Black and in like proportion; that he did this in order that the small stockholder would not be frozen out if he deemed that the property was worth more than the indebtedness; that pursuant to these notices a meeting attended by a large number of the stockholders of said Sunset Copper Mining Company was held in the City of Everett and that this defendant explained the whole matter to them reciting to them what he had done to protect their interest and informing them that said sale had been made and the sale had been confirmed and the title then stood in the name of Frank L. Bell and W. W. Black, but that they were entirely willing to allow each of the stockholders who felt that the property might be more valuable in the future and who wanted to participate in the proceeds of said property, upon paying their proportionate share of the indebtedness, to become interested in the proceeds of said property in like proportion of said Black and Bell were to retain title to the said property and be allowed to use and dispose of the same but to honestly account to the said stockholders for their proportionate share of any proceeds that might be derived by sale or otherwise from said property, and that after a discussion of the matter by the stockholders, a large number of them came to the conclusion that the property was not worth the amount of such indebtedness and that they did not care to pay their proportionate share, but that a number of the stockholders concluded that probably in the hands of said Bell and said Black the property might be so managed that more might be realized out of the same than the amount of the indebtedness and they did conclude to pay their proportionate share of indebtedness to said Bell and said Black and thereupon certificates were issued to them showing the amount of the indebtedness and the amount that they had to pay; which certificates provided that the said Frank L. Bell and said Black should be the owners of said property and have the right to dispose of the same or to improve the same in any manner that they might deem proper and that they were to honestly account to said persons for their proportionate share of the proceeds; that all of said transaction was done wholly and fully to protect the said stockholders and with no design of cheating or defrauding them in any way whatever; and that this complainant knew all of these facts but refused at any time to contribute anything either by lending to the company or otherwise furnishing a single cent to aid said company in developing or holding its property, but con-

tinued at all times to annoy the company and to threaten these defendants with annoying suits; that this defendant alleges that this suit has been brought for no other purpose than to annoy the said defendants in the hope that said defendants would be so annoyed as to pay him large sums of money for the purpose of getting rid of such annoyance.

XXIII.

As a further affirmative answer to the complaint herein, this defendant alleges that since the receiver's sale before mentioned said defendants Frank L. Bell and W. W. Black have caused assessment work to be done upon the said mining claims for the years 1909, 1910, and 1911, and that said assessment work was of the value and cost of approximately \$5,500.00 and said amount was actually paid out in cash for the purpose of holding said claims under and by virtue of the laws of the State of Washington and of the United States; that in addition thereto the said defendants have paid for the purpose of securing patents upon said claim, for surveying and necessary fees paid to the surveyor general and to United States for the purchase of said land at the rate of \$5.00 per acre, for advertising and attorney's fees, etc. and expenses incident thereto, more than the sum of \$8,000.00; all of which have been done since said receiver's sale, and all of which was properly and necessarily expended in holding and securing title to said claims. The defendant further alleges that in addition thereto large sums of money have been paid on account of taxes and for caretakers and watchmen, and also repairs to said property and expenses incident to looking after the same and the care thereof, and that neither the said complainant nor any other stockholder nor any person in the Sunset Copper Mining Company has paid or offered to pay any money on account of these things or anything else and that complainant has especially refused to pay anything at any time to assist the said defendants in holding or protecting said property.

Wherefore this defendant prays that this action be dismissed at the cost of the said complainant; that this court decree that the title in, to and concerning said claims mentioned in the complaint herein or in this answer and all other property mentioned in this complaint or answer, is in

said defendants, and for such other and further relief as to the Court may seem equitable and for his costs expended in this action.

J. A. COLEMAN,
L. L. BLACK,

Solicitors and Counsel for Defendant W. W. Black.

Office and Post Office Address, Everett, Washington.

State of Washington, County of Snohomish, ss.

W. W. Black, being first duly sworn on oath, deposes and says that he is one of the defendants named in the above entitled action; that he has read the annexed foregoing answer, knows the contents thereof and verily believes the same to be true.

W. W. BLACK.

Subscribed and sworn to before me this 25th day of November, 1913,

L. L. BLACK,

(Seal)

Notary Public in and for the State of Washington,
residing at Everett, Washington.

Service of the within answer is hereby acknowledged and admitted, and copy thereof received this 26th day of November, 1913.

GEORGE H. WALKER,

Attorney for Complainant.

Indorsed: Answer of Defendant, W. W. Black. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Nov. 26, 1913, Frank L. Crosby, Clerk. By E. M. L., Deputy.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern
Division.*

(In Equity.)

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Answer of Defendant Frank L. Bell

To the Judges of the District Court of the United States,
for the Ninth Circuit, Western District of Washington,
Northern Division:

The defendant, Frank L. Bell, appears as attorney in person for himself herein, and for a separate answer to the bill of complaint of the plaintiff, respectfully shows and alleges as follows:

1st. Answering paragraph "I" of said complaint, this defendant alleges and states that he is without knowledge as to whether the plaintiff was at the time mentioned in said complaint a citizen of the United States of America and a citizen and resident of the State of Pennsylvania.

2nd. Admits all of paragraphs numbered "II", "III", "V", "VIII", "XX" and "XXIII" of said complaint.

2nd. a. Answering paragraph "IV" of said complaint, admits that the defendant, Sunset Copper Mining Company, a corporation was organized under the laws of the State of Washington and a citizen and resident of said state up to about the year 1909 and alleges that since in or about the

year 1909, it ceased to be a corporation and since such time has not been a corporation and not a citizen and resident of said State of Washington.

2nd. b. Answering paragraph "VI" of said complaint, admits that the principal place of business of the Sunset Copper Mining Company was at Everett, Washington, and alleges that this defendant is without knowledge as to when said Company was organized, the amount of its capital stock and whether said stock was ever increased.

3rd. Answering paragraph "VII" of said complaint, this defendant alleges and states that he is without knowledge of whether the plaintiff now or at any time, owned 58,250 shares of the capital stock of the defendant corporation or any stock therein; and therefore denies the same and denies that this suit is brought without collusion to confer jurisdiction in a Court of the United States and denies that this action is brought in good faith and alleges with respect thereto, that the action is not brought in good faith but for the purpose of carrying out a threat made by plaintiff to this defendant, that unless this defendant and the defendant Black would buy plaintiff's said stock and pay him an exorbitant price therefor, that he would bring this action for the purpose of annoying and embarrassing the defendant, Black and this defendant and also for the further purpose of carrying out his threat that unless this defendant and said Black would let the plaintiff have an option at a figure which he should set that he would bring an action against said Black and this defendant to annoy and embarrass them and to hinder them in dealing with the mining claims and property referred to in said complaint.

4th. Answering paragraph "IX" of said complaint, admits that the defendant Black acted as trustee and resident manager of said corporation up to March, 1909, but denies that since said time he has acted either as such manager or trustee.

5th. Answering paragraph "X" of said complaint, admits that the books and stock records of said corporation were brought to Glens Falls, N. Y., temporarily for examination and making up and alleges that the same were at Glens Falls but for a few days only when they were

duly returned to the office of said corporation at Everett, Washington; and denies that the same was done and performed with the assent of this defendant, and as to the same alleges that this defendant at the time had no interest in said corporation or that he was in any way acting for it.

6th. Answering paragraph "XI" of said complaint defendant admits that one W. H. Baldwin became the owner of the majority of the stock issued by said corporation but alleges that he is and was without knowledge as to the number of shares of said corporation; and further that he is and was without knowledge as to the amount paid by Baldwin for any stock owned or held by him and from whom he acquired the same, and that this defendant is without knowledge as to the amount any of the stockholders of said corporation paid for their shares therein and denies that on October 7, 1903, that the officers and trustees of said defendant corporation wrongfully and fraudulently increased its capital stock without the knowledge or assent of minority stockholders or plaintiff or without a meeting called for that purpose as required by the laws of the State of Washington, and alleges that he is and was without knowledge of whether said W. H. Baldwin thereafter became owner and holder of a large number of shares of this additional stock or that he promised to pay said corporation the sum of ten cents per share and actually paid two and a half cents per share; admits that at the time of the death of said Baldwin about the year 1907, he was owner and holder of the 1,250,000 shares of the stock of said defendant corporation which was a majority of the shares issued and outstanding. And alleges that any increase in the stock of said company, if any, there was, was regularly made, and that if any of the same was bought by said W. H. Baldwin, he paid the full market value thereof and same was in the best interest of said Company.

VII.

Answering paragraph "XII" of said complaint denies that this defendant acted as attorney for W. H. Baldwin at any time whensoever, and that he ever acted as a co-trustee, majority stockholder or otherwise, with defendant Black, or each, all or any of them conspired and federated with each other or with the said W. H. Baldwin and Henry C. McNutt, or any other persons or any of them for the

purpose of defrauding the minority of the stockholders of said corporation or for the purpose of manipulating or handling the business of said corporation so as to throw the same into insolvency or for the purpose of converting the assets of the said corporation to their own use and benefit and to the injury of the plaintiff or any other persons and denies that they did anything for the purpose of injuring the corporation or any of its stockholders or to gain any benefit whatever, except to increase the value of all of the stock of said corporation, either between the years 1902 and 1906 or at any other time, but on the contrary said defendants allege that every act they did in connection with said corporation, was to protect the interests of the minority stockholders and every other stockholder and for the purpose of advancing the interests of said corporation; the said defendant admits that the notes described in said complaint were signed by the defendant corporation in favor of Ellen C. Baldwin, who was the wife of W. H. Baldwin, and that the mortgages described, were executed, but denies that said notes or mortgages were executed without any consideration whatever, but said defendant alleges that the said corporation received cash to the amount of notes mentioned and that said cash was actually expended by said company under the direction of the defendant Black in developing the property of the said company to the best of his ability and under the direction and by the authority of the Board of Trustees of said defendant corporation; that said money was used in making improvements upon the property of defendant corporation described in the complaint and that all of the said money was used in making improvements in said company, and that all of said improvements were made upon the advice and direction of skillful mining engineers and was made honestly for the interest of the company and that the consideration for the execution of said notes and mortgages was actual cash to the full amount of the sums mentioned in the said several notes and this defendant denies that they were any collusive or fraudulent actions on the part of the said defendants or by any of them; and this defendant alleges that at all times herein mentioned with reference to the transactions complained of in the complaint, the defendant Black acted according to his very best judgment in the interests of said company having an earnest purpose at all times to promote the interests of said company and its stockholders and the said defendant alleges that at all of the times the other trustees acted in the same manner so far

as known to this defendant; said defendant admits that the persons named in said paragraph were acting as trustees and alleges that all notes, except one for \$4,263.60 and one for \$4,649.50 were executed in Everett, Washington, and admits that the others were executed in New York; defendant alleges that the mortgage dated December 31, 1904, was executed in Washington and the other mortgage was executed in New York.

VIII.

Answering paragraph "XIII" of said complaint, this defendant alleges that he is without knowledge as to any of the facts in said paragraph stated, and therefore denies the same.

IX.

Answering paragraph "XIV" of said complaint this defendant admits the death of said Baldwin and the transfer of said stock and notes to this defendant, but denies that said notes were purchased long before their maturity and that this defendant had been attorney for said W. H. Baldwin for years previous to said transfer and denies that a large number of said claims so assigned to him were collusive and fraudulent and not properly due and owing from said corporation and denies that said purchase was made by this defendant to further a fraudulent attempt to convert the property and assets of said defendant corporation to the use and benefit of himself and said Black and to the loss and injury of the minority stockholders and alleges that this defendant paid full value for said stock and notes without any knowledge whatsoever on his part of any collusion or fraud in the issuing of said notes or in the purpose of issuing the same and alleges that there was no collusion or fraud in the issue of the same and further alleges that this defendant then and still had no desire to control said corporation or to injure its minority stockholders but took said notes and stocks in due course for value.

X.

Answering paragraph "XV" of said complaint, denies conspiracy or confederating with said Black at any time to convert assets of said company to their use or either of them; admits that the suit was brought by this defendant in Superior Court, Snohomish County, against the defendant which alleged that said defendant was insolvent and unable to pay its debts which were more than \$40,000.00, and that said defendant had no cash, that its mining claims were valuable and would be forfeited unless the assessment work was done; that said complaint asked that a receiver be appointed to care for the property of said corporation and authorized to sell its property and that this plaintiff be allowed to bid at the sale thereon, and alleges with reference thereto that it was without conspiring or confederating to convert the assets of said corporation to the use of said Black and this defendant; denies that there was no proper service of a summons in said action on the defendant corporation and no defense made by it and further alleges that this defendant is without knowledge what judge appointed a receiver of said corporation; and is also without knowledge what proceedings were taken in said action; admits that judgment was entered in said action for \$37,501.75 which was made a lien upon all mining property of said defendant corporation; that the judgment adjudged said corporation insolvent and that a permanent receiver was appointed but denies that said proceedings were null and void for any reason whatsoever and further denies that said proceedings were a part of collusion and fraudulent scheme, planned between said Black and this defendant, intended to secure control to them of the property and assets of said defendant corporation and of converting same to their use and benefit; and denies that said judgment was procured solely through fraud and collusion; admits that records in said action show that the Court found that the allegations of plaintiff's complaint were true and alleges that the same were true, and further alleges that the summons and complaint in said action was served upon the defendant corporation personally, and that the plaintiff in this action had notice thereof at and previous to the time said action was commenced and further that he personally suggested to and requested this plaintiff to foreclose said mortgage and at the same time demanded that after the same was foreclosed that this defendant give to him an option thereof.

XI.

Answering paragraph "XVI" of said complaint this defendant alleges that he is without knowledge as to any and all of the allegations therein contained and therefore denies the same.

XII.

Answering paragraph "XVII" of said complaint, this defendant admits the filing of the claim of judgment in the sum of \$12,764.57 but denies that the defendant corporation was not doing business in the State of New York and denies that there was no sufficient service of summons upon the defendant as alleged in said paragraph and that judgment in said action was taken without service of any kind or secured through fraud and collusion and is wholly void and of no effect; and denies that it is an unlawful claim against said defendant corporation and with respect thereto alleges that said judgment was regularly and properly taken and founded upon a valuable consideration and upon a debt justly due and owing this defendant from said defendant corporation, and denies it should not have been allowed by said receiver.

XIII.

Answering paragraph "XVIII" of said complaint, defendant alleges that he is without knowledge as to any of the allegations therein contained, and therefore denies the same.

XIV.

Answering paragraph "XIX" of said complaint, defendant admits that the total amount of claims filed was in excess of \$64,000.00 and admits that one petition of the receiver set forth that claims to the amount of \$2,000.00 were filed with him within the time required by the said notices, but alleges that in another report he showed that claims in excess of \$64,000.00 had been filed and alleges that same were by the court adjudged to be valid claims and admits that the court had by its order mentioned in said paragraph adjudged said claims to be valid and subsisting; this de-

fendant admits that Judge Lester Still from Island County was called in by this defendant to hear the petition and that after said Lester Still had heard said motion he signed the order mentioned in said paragraph and admits that by such order, said receiver was only required to require a payment of only \$2,000.00 cash and alleges that said order provided that the remaining of the bid could be paid by the claims proved before said receiver; this defendant alleges that the reason for requiring payment of case was to have a sufficient amount of cash on hands to pay the receiver and the costs and expenses of the receivership and of such sale.

XV.

That as to paragraph XXI, this defendant admits that the said E. Rudabeck requested that the receiver be instructed to bring an action against Ellen C. Baldwin for the unpaid portion of the capital stock so owned by her or her assignee Frank L. Bell; this defendant admits that said receiver was not directed so to do, and this defendant admits that said receiver reported that the said Ellen C. Baldwin did not owe the said corporation any sum and this defendant denies that said report was not based upon a bona fide investigation or upon any investigation at all, but alleges that the said receiver secured information as to the condition of affairs and as to the conditions of the estate of Ellen C. Baldwin, and he reported in open Court to the Judge that there was no legal claim of said corporation against Ellen C. Baldwin.

XVI.

Answering paragraph "XXII" of said complaint, admits that said property was bid in by said Black and this defendant; admits paying the sum of \$2,000.00 in cash, and as to said sale, alleges that the bid of said Black and this defendant was the sum of \$40,000.00, and that in bidding in said property, this defendant acted in his individual capacity; denies that the cash payment of said Black and this defendant was in cancellation of their claims against the defendant corporation and denies that at the time of said receiver's sale this defendant acted as a trustee of said defendant corporation and denies that he had been for several years the attorney for said defendant corporation and with respect thereto alleges that he never acted as at-

torney for said corporation after the death of W. H. Baldwin, which was about the month of February, 1905, except in one instance, serving a summons and because its officers represented they had no money to employ an attorney, nor was he ever a trustee of said corporation except for a day about the month of February, 1904.

XVII.

Answering paragraph "XXIV" of said complaint this defendant denies that the proceedings in suit of Frank L. Bell vs. said defendant corporation were collusive and fraudulent; denies that this defendant was a party to said fraud and collusion; denies that he conspired and confederated with said Black or any one whomsoever, in the conduct of such suit for the purpose of converting the property and assets of the defendant corporation to the use of said Black and himself and to the injury of plaintiff; denies that he directed the taking of any proceedings which resulted in the final sale of the property. Denies that he wrongfully and fraudulently attempted to become a co-owner, in consideration of the sum of \$2,000.00 and the cancellation of his collusive and fraudulent claim or of property of the defendant corporation; denies that the price for which said properties were sold at receiver's sale is absurdly low, and not more than a nominal consideration therefor; admits that application has been made for patent on the thirty-six mining claims described in the complaint and that upon granting of said patents said Black and this defendant will become the owners in fee simple thereon; alleges that he is without knowledge of the value of the property in question.

XVIII.

Answering paragraph "XXV" of said complaint admits that since the assignment of stock from Ella C. Baldwin to this defendant, he and said Black have owned a majority of the stock of said corporation; but denies that ever since such time, they have been and still are in control thereof; denies that they have conspired and confederated with each other and operated and controlled said corporation, disregarding its rights and interest and the rights and interests of minority stockholders of which plaintiff is one of them. Denies that they have carelessly mismanaged said corpora-

tion and neglected their duties as trustees thereof and denies committing acts of willful misconduct and breach of trust, and denies that either fraudulent or willful conduct was allowed to be committed by their officers and trustees of said defendant corporation, and denies that fraudulent and willful conduct on the part of certain officers of said defendant corporation could have been prevented by said Black and this defendant giving care and attention to their duties and with respect to the allegations in said paragraph contained, this defendant alleges, that he has never sought to control said corporation and has never in any way interfered therewith and since the stock was so transferred to him he has not counselled with any of the officers of said corporation, has attended none of its meetings, and has never had any of said stock transferred to him upon the books of said corporation and therefore has never been entitled to vote thereon. He further alleges with reference thereto, that he offered to this plaintiff, a proxy to vote said stock from said Ellen C. Baldwin to the end that plaintiff might elect himself in as a trustee and manager of the defendant and said plaintiff declined said offer and refused to have anything to do with the defendant corporation in the management or control thereof and in connection with this defendant's offer thereon said plaintiff advised this defendant that he would not assist said corporation either in giving his time or financial aid.

XIX.

For a separate and further defense the said defendant alleges that one N. Rudebeck, a minority stockholder of said Sunset Copper Mining Company, entered a motion to set aside the sale of the property of said company by said receiver, as alleged in the bill of complaint herein. That said motion was made in behalf of himself and all other stockholders and was denied by the Court about the month of March, 1909, and said order was not appealed from and is unreversed and the decision thereon is *res judicata* thereon and binding upon the complainant in this suit and by reason thereof plaintiff cannot maintain this suit, nor can he attack said order by this, a collateral action; and said defendant further alleges that after the sale of said property by the receiver of said Court, N. Rudebeck and other stockholders appeared in said court and objected to the confirmation of such sale, objecting and alleging substantially the allegations

contained in the complaint in this action, and the court duly heard the same, passed upon the same, and overruled their objection and confirmed said sale, all of which was done in the Superior Court of the State of Washington in and for the County of Snohomish, being the court in which the receiver had been duly appointed and in which said proceedings were duly pending, and by reason of the foregoing, the matter is *res judicata* and this plaintiff cannot maintain this suit nor attack said order by this, a collateral action.

XX.

For a separate and further defense herein, defendant alleges that now, and at the time plaintiff's alleged cause of action arose and accrued, the laws of the State of Washington, in substance, provided "The Superior Court in which a judgment has been rendered or by which or the Judge of which a final order has been made, shall have power, after the time at which said judgment or order was made, to vacate or modify such judgment or order for fraud practiced by the successful party in obtaining the judgment or order upon a petition filed in the original case within one year after the judgment or order was made." That this suit is not a petition in the original case and was not commenced within one year after the rendition of said judgment and the taking and filing of said order under the laws of the State of Washington, the alleged cause of action set out in the complaint herein is barred by the Statute of Limitation and plaintiff has no right to maintain the same.

XXI.

As a separate and further defense herein, defendant alleges that now and at the time plaintiff's alleged cause of action arose and accrued, the laws of the State of Washington, in substance provided, "That actions for relief upon the ground of fraud must be commenced within three years after the cause of action thereon shall have accrued," and the alleged cause of action set forth in the complaint accrued more than three years before the time of the commencement of this suit by plaintiff; that plaintiff knew of the taking of said judgment and order at the time of the taking of each thereof and at and from such time has had full

knowledge of all of the same and of all the matters alleged in the complaint herein, and this suit is barred by said limitation statute.

XXII.

As a separate and further defense herein this defendant alleges that at the time plaintiff's alleged cause of action arose and accrued the laws of the State of Washington in substance provided and ever since said time have provided and do now provide that for any of the matters complained of in the complaint, action shall be commenced within two years after the cause of action shall have accrued; that Section 165 of Remington & Ballinger's Annotated Codes and Statutes of Washington provides that an action for relief not hereinbefore provided for shall be commenced within two (2) years after the cause of action shall have accrued, and defendant further alleges that complainant is seeking to have the defendant declared a constructive trustee of said property on the ground that he was a director of said company when he purchased the property at said receiver's sale, and defendant alleges that such a proceeding is an action for relief not otherwise provided for in the laws of Washington, and that it therefore falls within Section 165 of Remington & Ballinger's Code above cited; that the alleged cause of action set forth in the complaint did not accrue within two years next before the commencement of this suit by plaintiff, and that the plaintiff knew of all of the facts set forth in the complaint and had full knowledge of the same at all the times mentioned in the complaint herein and this suit is barred by said limitation statute.

XXIII.

That said complainant was guilty of laches in bringing his alleged cause of action and that his alleged cause of action and bill of complaint is stale; that said complainant knew of the acts and transactions alleged in his complaint at or about the time of their happening; that said complainant had knowledge of the increase of capitalization of said corporation of the sale of stock to said Ellen C. Baldwin and to said W. H. Baldwin and of the terms of sale, of the giving of the notes and mortgages to Ellen C. Baldwin, of the bringing of the foreclosure suit in Snohomish County, of

the receivership of said corporation, of the sale of said property, of the objections filed by said Rudebeck, of the confirmation of the sale to Black and Bell, and that said Black was a trustee at the time of the purchase, and of the other transactions at or about the time they occurred; that said complainant knew the defendants were expending funds after the purchase for the development and patenting of said property; and defendant further alleges that all the court proceedings of Snohomish County, alleged in said bill of complaint were duly recorded as provided by law, in the County where said mining property is situate, and that said complainant had constructive knowledge as well as actual knowledge of said transactions and this defendant alleges that if complainant had any cause of action against the defendant herein, he should have brought same before defendants Black and Bell had expended large sums of money in holding the property as alleged herein; that there is no valid excuse for the delay of said complainant and that even if complainant ever had a cause of action, which this defendant denies, that his delay has prejudiced and injured this defendant; this defendant alleges that complainant's cause of action is barred by inexcusable delay and laches.

XXIV.

For a separate and further defense, herein, this defendant alleges, that the Court is without jurisdiction to hear and try this cause, for the reason that it appears upon the face of the bill that this suit is brought by plaintiff for the benefit of the Sunset Copper Mining Company, a corporation of the State of Washington. That an action therefore must be brought by said Company and can only be brought by a stockholder thereof, after such stockholder has demanded that such Company bring action, and upon its refusing to do so and that complainant has never demanded of said corporation that it bring this action.

XXV.

That previous to the month of May, 1908, the said Ellen C. Baldwin had loaned said Sunset Copper Mining Company, money, for which said Company gave its notes as follows:

One dated November 3d, 1903, payable in one year from the date thereof, for	\$ 6,000.00
One dated November 13th, 1903, payable in one year from the date for.....	1,000.00
One dated November 20th, 1903, payable on demand for	1,000.00
One dated November 27th, 1903, payable on demand for	3,000.00
One dated February 8th, 1904, payable on demand for	5,471.00
One dated February 8th, 1904, payable on demand for	5,000.00
One dated September 17th, 1904, payable on demand for	4,649.50
<hr/>	
Total	\$29,384.10

and one other note of \$2,000.00 made the latter part of the year 1904, or in the year 1905, making a total of \$31,384.10.

That all of said notes represented actual cash advanced by her to said Company and substantially all of the money advanced to said Company and represented by said notes actually passed through the hands of this defendant, who had knowledge thereof. All of said money was advanced by her to pay debts of said company, install machinery and mining equipment and to do the assessment work to hold said company's mining claims and, to the knowledge of this defendant substantially all of said money was expended by this defendant solely and wholly for the use and benefit of the said Sunset Copper Mining Company and was expended honestly to further the interests of the said Sunset Copper Mining Company and to improve its property to the best of the ability of the said defendant,

and said defendant alleges and he is informed and believes and therefore alleges to be the fact that all of the said indebtedness was for a good and valuable consideration assigned to Frank L. Bell. Said defendant alleges that all of the money not used for actual improvements upon said property, was expended for necessary expenses connected with the business of said corporation and was inconsiderable in amount.

XXVI.

For a separate and further defense and for a specific defense to the allegations in paragraph "VII" of said complaint, that this action is brought by plaintiff in absolute good faith, this defendant alleges, that after the assignment to him of the indebtedness held by Ellen C. Baldwin, in notes representing \$29,384.10 and upwards, that the complainant came to the City of Glens Falls, N. Y., where this defendant resides and remained there for several weeks. That for about the first week of his stay in Glens Falls, he frequently or almost daily called upon the said Ellen C. Baldwin demanding of her that she give him an option upon the notes and stocks which he claimed she had in the defendant corporation and was advised by her that she had no stock or notes but had transferred same to this defendant but for said week or thereabouts he declined to call upon this defendant. He next came to the office of this defendant and for some days took much of this defendant's time and demanded at first that this defendant take steps to oust the defendant Black as a trustee of the defendant corporation and place the complainant in his stead as trustee and resident manager at a large salary, all of which this defendant declined to do unless he, the said complainant, would go to Everett, Washington, and spend his whole time, and further condition upon his getting the consent of the local stockholders at Everett, and the defendant Black, thereto, and of his being able to raise money to pay to himself a fair salary which should be agreed upon by the trustees of the corporation. This the said complainant declined; and thereupon demanded that this defendant give to him an option upon the notes set up in the complaint and of the stock in the defendant corporation which had been assigned to this defendant. That he demanded that defendant give

him an option on such holdings in the sum of \$60,000.00 and with it a separate agreement that in case he made a sale of the same that this defendant would secretly pay him for such sale, \$20,000.00 all of which this defendant declined to do. The next said complainant came to the office of this defendant and demanded that defendant pay him \$20,000.00 for his stock and thereupon said to defendant that in case defendant declined so to do, he would write letters to all of the stockholders of the defendant corporation and from them obtain money with which to institute suits against this defendant and said Black to annoy them in the management and sale of the property and would take such steps and proceedings as would prevent this defendant ever getting anything out of his stocks or debts in said defendant corporation. Whereupon this defendant demanded that the complainant leave his office and never return, since which time he has not returned, and this defendant alleges that this action is brought by the plaintiff to carry out his said threats as above set forth and for the purpose of compelling if he can, said Black and this defendant to pay him money and buy his stock in said corporation and for no other purpose whatsoever.

XXVII.

For further and separate defense to the complaint herein and as a counterclaim to the alleged cause of action set forth in the complaint, this defendant alleges, that since the year 1907, said defendants Black and Bell have caused assessment work to be done upon said mining claims for the years, 1908, 1909, 1910 and 1911 at a cost to this defendant of approximately \$7,300.00 and said amount was actually paid out in cash for the purpose of holding said claims under and by virtue of the laws of the United States and of the State of Washington; that in addition thereto, the said defendants have paid for the purpose of securing patents upon said claims surveying and necessary fees paid Surveyor General, and the United States for purchase of land, advertising and attorneys fees, upwards of \$8,000.00 all of which has been done since said receiver's sale and was properly and necessarily expended for holding and securing title to said claims and that upwards of \$4,000.00 of said money has been expended by this defend-

ant. Defendant further alleges that in addition thereto, large sums of money have been paid on account of taxes and for caretakers and repairs to property and expenses incident in looking after the same; that this defendant has personally paid on such taxes, \$500.00 and that said complainant and no other stockholder of said defendant corporation has offered to pay anything on account thereof. That when the complainant was at Glens Falls as aforesaid, the matter of doing the assessment work for holding the said defendant corporation's mining claims was talked of with him and also the matter of securing patents for said claims and in said talk he advised the doing of the same by said Black and this defendant and agreed to its being charged to the defendant corporation and assented to its being proper and legitimate work to do; that he expressly stated to this defendant that he would consent to the corporation paying for such assessment work and expense of securing a patent of the claims out of the property of the corporation and further agreed that if he later found himself financially able so to do, that he would contribute thereon and that this defendant expended money in doing such assessment work and urged the securing of such patents in reliance upon the representations and agreements of the said complainant. That before this defendant foreclosed said mortgage he requested the complainant and others to pay their proportionate part of the indebtedness of the defendant corporation and of the expense of doing assessment work for the year 1908 and thereafter if necessary, and of securing patents on its said claims, personally writing letters to all stockholders known to this defendant including complainant and agreeing that this defendant would advance such part of the cost thereof as the amount of stock held by him bore towards the total amount of stock outstanding of said corporation provided other stockholders would do likewise and that complainant refused to contribute his proportionate share thereto as did all other stockholders with the exception of the defendant, Black and about six or seven other small holders. And this

defendant alleges that said defendant corporation is without means with which to pay the indebtedness and the stockholders thereof are unwilling so to do and that the complainant is financially unable to do the same as he so advised this defendant.

Wherefore, the defendant demands judgment as follows:

First: That the complaint herein be dismissed with costs against the plaintiff and in favor of this defendant; and that it be decreed that defendants herein own all property mentioned or referred to in the said complaint.

Second: In the event of the Court setting aside said sale, and conveyance by said receiver to these defendants, then that the Court ascertain and determine the amount of money loaned by said Ellen C. Baldwin to said defendant corporation, the amount of indebtedness of said corporation to this defendant, including the amount of money advanced by this defendant to pay taxes and for doing assessment work, making surveys, application for patents, paying for land and money advanced it for all other lawful purposes, and that said corporation and the plaintiff be decreed as a condition precedent to pay this defendant the amounts so ascertained and determined by the Court and to so pay the same previous to the time of granting such decree herein and as a condition of setting aside the said sale and conveyance and that the defendants have such further, other and different relief as upon the trial of the issues herein, the Court shall deem equitable.

Dated December 24th, 1913.

FRANK L. BELL,

Attorney in person for Defendant, Frank L. Bell, Office and P. O. Address, Glens Falls Ins. Building, Glens Falls, N. Y.

at which place service of all subsequent papers herein may be made.

State of New York, County of Warren, ss.

Frank L. Bell, being first duly sworn, on oath, deposes and says that he is one of the defendants named in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and verily believes the same to be true.

FRANK L. BELL,

Subscribed and sworn to before me this day of December, 1913.

Notary Public in and for the
County of Warren, State of
New York, Residing at Glens
Falls, N. Y.

Indorsed: Separate Answer of the Defendant Frank L. Bell. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 29, 1913. Frank L. Crosby, Clerk. By E. M. L. Deputy.

*In the District Court of the United States, for the Western
District of Washington, Northern Division.*

(In Equity.)

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

**Order on Complainant's Motions to Strike Certain Parts of the
Answers of the Defendants, W. W. Black and Frank L. Bell**

This cause came on regularly for argument on the 24th day of February 1914 upon the complainant's two motions the one to strike certain parts of the answer of the defendants, W. W. Black the other to strike certain parts of the answer of the defendant, Frank L. Bell, the defendant W. W. Black appearing by Lloyd L. Black, the defendant Frank L. Bell having stipulated that the ruling of the court as respects the defendant W. W. Black should be the ruling as respects the defendant Frank L. Bell, and the complainant appearing by George H. Walker.

It is ordered that complainant's motions to strike paragraphs XX, XXI and XXII of each of said answers be, and the same are hereby granted.

To the making and entering of this part of the order the defendants W. W. Black and Frank L. Bell except and their exceptions are hereby allowed.

It is further ordered that in all other respects the complainant's motions to strike are denied.

To the making and entering of this part of the order the complainant G. J. Buchler excepts and his exceptions are hereby allowed.

This order is made upon the express understanding that it is the desire of the court that the widest possible latitude consistent with the rules of evidence shall be given all parties to this cause, to the end that a full hearing of complainant's cause of action as stated in his bill of complaint shall be had as well as a full hearing of the defendants' various remaining defenses and that the court will on final hearing of the cause and after all the evidence is in make revision of the various rulings this day in this order herein made, should such a revision be in the judgment of the court warranted by said final hearing and in the light of all the evidence.

It is further ordered that upon the final hearing and trial of the cause the defendants may present evidence of the various statutes of limitation as pleaded in their respective answers but the court in allowing the presentation of such evidence does not bind itself to follow such statutes of limitation.

It is further ordered that said answers of the defendants need not be re-drafted to comply with the terms of this order but that said paragraphs XX, XXI and XXII shall be considered as stricken from said pleadings.

JEREMIAH NETERER, Judge.

Indorsed: Order on Complainant's Motion to Strike certain parts of Answer of Defendants. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Feb. 24, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

*In the District Court of the United States, for the Western
District of Washington, Northern Division.*

(In Equity.)

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Stipulation

It is stipulated and agreed by and between counsel for the complainant and Frank L. Bell, one of the defendants who has appeared for himself in this cause without other counsel, that the motion of the complainant to strike certain parts of the last answer of the defendant, Frank L. Bell, on file herein may be heard at the same time the motion to strike certain parts of the last answer of the defendant, W. W. Black, is heard and that whatever ruling shall be made by the Court as respects the latter motion shall be considered the ruling as respects the former motion.

Dated this 5th day of January, A. D. 1914.

FRANK L. BELL,

Appearing for himself.

O. C. MOORE,

GEORGE H. WALKER,

Solicitors and counsel for the
Complainant, G. J. Buchler.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 17, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

*In the District Court of the United States, for the Western
District of Washington, Northern Division.*

(In Equity.)

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Stipulation

Reserving the right to object to any evidence herein referred to for incompetency, irrelevancy and immateriality the defendants, W. W. Black and Frank L. Bell, hereby stipulate and agree with the complainant as follows:

I.

That for the purpose of proving the record of the case of Frank L. Bell vs. Sunset Copper Mining Company, No. 3554 in the United States Circuit Court for the Northern District of New York, the complainant may introduce without objection as to form or its not being the best evidence, the duly certified copy of the complete record of the case of Frank L. Bell vs. Sunset Copper Mining Company No. 9510 in the Superior Court of the State of Washington for the County of Snohomish, in which appears a complete copy of said case No. 3554.

II.

That during all the time from its commencement until final judgment was entered in said case No. 3554, the

statute of the State of New York required and still requires compliance with certain formalities by foreign corporations before they are permitted to do business in the State of New York, a copy of which statute, insofar as material to this case, is hereunto attached marked Exhibit "A" and thereby made a part of this stipulation.

That the phrase "moneyed corporation" in said statute covers banking and insurance corporations and that the Sunset Copper Mining Company is not now and never was a "moneyed corporation" within the meaning of said statute.

III.

That the Sunset Copper Mining Company never complied with said statute.

LLOYD L. BLACK,

A. COLEMAN,

Attorneys for Deft. W. W.
Black.

FRANK L. BELL,

In person and as attorney for
the defendant, Frank L. Bell.

O. C. MOORE,

GEORGE H. WALKER,

Attorneys for Complainant.

EXHIBIT "A."

Par. 15. Certificate of authority of a foreign corporation. No foreign stock corporation other than a moneyed corporation, shall do business in this state without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business or if more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The Secretary of State shall deliver such certificate to every such corporation so complying with the requirements of law. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate. This prohibition shall also apply to any assignee of such foreign stock corporation and to any person claiming under such assignee or such foreign stock corporation or under either of them. No certificate of authority shall be granted to any foreign corporation having the same name as an existing domestic corporation, or a name so nearly resembling it as to be calculated to deceive, nor to any foreign corporation, other than a moneyed or insurance corporation, with the word "trust," "bank," "banking," "insurance," "assurance," "indemnity," "guarantee," "guaranty," "savings," "investment," "loan," or "benefit" as a part of its name.

Par. 16. Proof to be filed before granting certificate. Before granting such certificate the Secretary of State shall require every such foreign corporation to file in his office a sworn copy in the English language of its charter or certificate of incorporation and a statement under its corporate seal, and the signature of its president, vice-president or other acting head, particularly setting forth the business or objects of the corporation which it is engaged in carrying on or which it proposes to carry on within the state, and a place within the state which is to be its principal place of business, and designating a person upon whom process against the corporation may be served

within the state. The person so designated must have an office or place of business at the place where such corporation is to have its principal place of business within the state and such designation must specify such office or place of business of the said person so designated, and if it is within a city the street and street number if any, or other suitable designation of the particular locality. Such designation shall be accompanied with the written consent of the person designated and shall continue in force until revoked by an instrument in writing designating in like manner some other person upon whom process against the corporation may be served in this state or until the filing in the same office of a written revocation of said consent executed by the person so designated. If the person so designated dies or removes from the place where the corporation has its principal place of business within the state, or files such revocation of his consent, and the corporation does not within thirty days after such death or removal or revocation of consent designate in like manner another person upon whom process against it may be served within the state, the secretary of state may revoke the authority of the corporation to do business within the state, and process against the corporation in an action upon any liability incurred within this state before such revocation, may, after such death or removal, or revocation of consent, and before another designation is made, be served upon the secretary of state. At the time of such service the plaintiff shall pay to the secretary of state two dollars, to be included in his taxable costs and disbursements, and the secretary of state shall forthwith mail a copy of such notice to such corporation if its address, or the address of any officer thereof, is known to him. The secretary of state may require the execution of any such designation, revocation or consent, to be authenticated as he deems proper and he may refuse to file it without such authentication.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Apr. 21, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

United States District Court, Western District of Washington, Northern Division.

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING COMPANY, Defendants.

No. 2112

Filed May, 1914.

On Final Hearing

O. C. MOORE, of Spokane, Wash.

GEORGE H. WALKER, of Seattle, Wash., for Complainant.

ROBERT McMURCHIE,

J. A. COLEMAN,

LLOYD L. BLACK, all of Everett, Wash., for Defendant.

NETERER, District Judge.

The plaintiff is now and during all times material to this action has been a citizen of the State of Pennsylvania. Defendant Bell is and has been a citizen of Glen Falls, New York, and defendant Black a citizen of Everett, Washington. The Sunset Mining Company is a corporation organized under and by virtue of the laws of Washington with its principal place of business at Everett. Defendant Black was judge of the superior court of Washington for Snohomish County from January, 1905, to January, 1913. He was also one of the trustees of the defendant company from 1903, and during a portion of that time served as secretary of the defendant company and as its local general manager. The majority of the trustees of the defendant company during the time material to this inquiry lived at Glen Falls, New York, where the majority of

the stock of the company was held. The company had an office at Glen Falls, and seems to have transacted its business from there, except the stockholders' meetings which were held at Everett, Washington. W. H. Baldwin appears to have been the dominating influence by reason of his large stock holdings. Defendant Bell is a lawyer and was the legal adviser of W. H. Baldwin and Ella Baldwin, his wife, and for a time was general attorney for the defendant corporation. He never acted as trustee for the defendant company except for one day in 1904. At this time it seems to have been necessary to enable the company to transact some business to fill a vacancy on the board, and he was elected and continued a trustee for one day. Defendant Black was not present at this meeting, and it does not appear that he knew anything about it. On August 3, 1904, the employment of Bell as attorney for the defendant company ended, although thereafter he attended to some legal matters for the company under special employment. The defendant company was capitalized for one million shares at \$1.00 per share, which was subsequently increased to three million shares, and it acquired 36 mineral locations upon government land, and was required for the purpose of holding the claims to do \$3600 worth of assessment or development work each year. The company had no funds except such as it obtained from selling what is termed in the evidence "treasury stock." This is stock contributed to a fund to be sold for the company's use. This stock was sold at from two cents per share upwards and the proceeds were used for doing assesment work. Funds derived from this source were insufficient for the company's needs, and the Baldwins advanced and loaned to the defendant company from time to time \$29,384.10, and on February 10, 1905, a mortgage was given by the defendant company to Ella Baldwin to secure the payment thereof. The defendant Black advanced to the company December 26, 1906, for the purpose of doing its assessment work, \$1500, and a mortgage to secure the repayment was thereafter made upon the company property to Black. On October 6, 1906, the defendant Black secured an option to purchase from Ella C. Baldwin 1,250,000 shares of the capital stock of the defendant company, and claims and mortgages held by her against said company amounting to not less than \$35,000, for the sum of \$100,000 to be paid at stated times and upon default Black's interest to cease, the stock and evidence of

indebtedness to be placed in bank in escrow, W. H. Baldwin having died in April, 1905, leaving Ella C. Baldwin, his widow, with no property except the Sunset property and her home. On November 5, 1906, Black sold his option to Soderberg for \$130,000 and received \$10,000. Soderberg assumed payments to be made to Mrs. Baldwin, and afterwards sold his contract to the Chelan Consolidated Copper Company. On February 13, 1907, Black in his individual capacity entered into a contract with the Chelan Consolidated Copper Company, in which the Baldwin option and Soderberg sale and purchase by the Consolidated Copper Company was recited, with the further recitation that all parties desired to have the claims and properties of the Sunset Copper Company improved and that the options did not contemplate the development of the mining claims beyond the ordinary prospective and development work, and that because of such fact the Chelan Consolidated Copper Company may enter upon the property "and develop * * * the same * * * and extract and ship * * * ores * * * in such manner as it may deem fit * * * but * * * in a miner-like manner, and all for the use and benefit of the Sunset Copper Company;" the Consolidated Copper Company to develop and pay the costs and expenses and upon the sale of the ore to pay the cost of mining and shipping and pay the balance, if any, to the Sunset Copper Company. This company did no work under this contract, but paid to defendant Black the \$20,000 due him. On March 27, 1907, the Consolidated Copper Company sold its option to Albers, and on April 2nd following, Albers sold same to the Trout Creek Copper Company. This company expended in developing the mining property from \$16000 to \$20000. It sold approximately \$8,000 worth of ore. The contract entered into by Black and the Chelan Consolidated Copper Company was ratified by the Sunset Copper Company as its act, and the board of trustees elected a general manager to look after the company's interest while this work was being done. The Sunset Copper Company afterward contended that it should receive the value of the ore shipped, which the Trout Creek Copper Company denied. A suit was commenced in New York to recover the \$8,000 received for the ore. This suit was on May 23, 1908, settled by the parties, all of the trustees of the Sunset Copper Company and the plaintiff in this case signing the agreement for such settlement. On December 9, 1908, defendant Bell, having succeeded to the Bald-

win mortgage and stock, commenced a foreclosure proceeding in the superior court of Snohomish County, and on the same day a receiver was appointed, and it was "ordered that said receiver cause all necessary assessment work to be done upon the aforesaid mining claims;" and he was authorized to issue receiver's certificates for work done. Claims were filed with the receiver against the company by H. C. McNutt, \$1307.95; defendant Bell, a judgment obtained in New York for \$12,767.67; H. W. Holmes, \$1488; W. W. Black, \$10,923.21, a part of which was for the mortgage given; Bartlett, \$12.80; and the Bell mortgage, on which suit was commenced, \$37,501.71. On March 18, 1907, Rudibeck, a stockholder, filed an affidavit on behalf of himself and other stockholders and attacked the indebtedness and charged fraud and collusion. The claims were approved by the court and ordered paid, the property was sold, March 20th, to W. W. Black and F. L. Bell, and on March 29th, Rudibeck filed protest and objection to the confirmation of the sale. On March 30th, L. T. Reed, a stockholder, filed objection to the confirmation of sale. Objection to confirmation was based in substance on the same grounds upon which relief is sought in the complaint. On April 5, 1909, the objections to the confirmation of the sale came regularly on for hearing before the court. The objections were overruled and sale confirmed, and conveyance by the receiver made to defendants, Black and Bell.

There is no evidence before the court that there was any collusion between the defendants Black and Bell with relation to any of the conduct of the business of the defendant company, nor is there any evidence before the court to justify the conclusion that either the defendant Black or Bell had any influence over the board of trustees or exercised any undue influence of any character in any of the proceedings referred to in the complaint. There is no evidence before the court that any information with relation to the conditions or status of the defendant company's property was at any time withheld from the plaintiff. By the evidence it is shown that the plaintiff was at all times advised of the financial condition and status of the defendant company, knew of every act and thing that was done by the board of trustees, and that he was advised more than a year prior to the institution of the foreclosure action that the company was without funds

and he was requested to contribute as a stockholder to the fund in connection with the other stockholders for the purpose of relieving the financial stress of the defendant company and doing the assessment work, and he declined to contribute anything and stated that none of the stockholders would contribute. The plaintiff requested the defendant Bell to foreclose his mortgage more than a year prior to the time when foreclosure proceedings were instituted, and that he be given an opportunity to sell the property. He also asked the defendant Black to use his influence with defendant Bell to secure a foreclosure. After the defendant Bell acquired the mortgage from Mrs. Baldwin, defendant Black made a trip to New York for the purpose of inducing the defendant Bell to withhold foreclosure proceedings, stating to defendant Bell that he believed money could be realized within a year to liquidate the indebtedness. Defendant Bell agreed to wait and at the expiration of a year, no payments having been made, and it being necessary that the assessment work be done to protect the property, sent a circular letter to all of the stockholders among whom was the plaintiff, and set forth the status and condition of the property, stating in substance that unless payment was made that foreclosure would ensue. None of the stockholders responded, except one small holder, and his check was returned when the other stockholders, including the plaintiff, declined to contribute. The assessment work for 1909 was not done, and the time in which it was required to be done expired January 1st next ensuing. This notice was dated November 16, 1908, and informed the stockholders of the indebtedness of the defendant company, and that the receivership was threatened, and his willingness to advance funds in proportion to the stock held by him for Mrs. Baldwin if the other stockholders would do likewise. Defendants Black and Bell since acquiring the property have expended in assessment work on the mining claims approximately \$25,000. There is no direct evidence before the court as to the value of this property as mineral land.

The complainant seeks to have Black and Bell declared trustees of the property for defendant company and in the concluding paragraph of his reply brief says:

“The controlling factors in this case are the withholding by Black of \$30,000, and the manipulation by the defendants of the corporation’s property. Upon these two points the final decision must rest. In comparison with these two points all else is incidental.”

I think counsel has over-emphasized this statement and the relation of the defendants to each other and to the defendant company. The evidence shows that the defendant Bell knew nothing about the option to Black until after it was given. There is no testimony showing any collusion between Black and Bell in the carrying out of a common design. Bell did not approve the transaction, and was a stranger to its bearings and relations. As to the defendant Black he could not have taken this option for the company of which he was trustee. The corporation could not traffic in its own stock. He did nothing as an individual that he could have done as a trustee. He did nothing detrimental to or jeopardized any interest of the defendant company. On the contrary he obtained for the defendant company by this act from \$16,000 to \$20,000 worth of work without expense, and this work was utilized by the defendant company as a basis for its assessment work for the year 1907. This work was done with the consent of the defendant company and the concluding relations between the defendant company and the Trout Creek Company which did the work was adjusted amicably after the commencement of a suit, and with the plaintiff’s written consent. There is no evidence presented which would justify any court in finding that there was any manipulation of the defendant company’s property by the defendants Black and Bell, which injuriously affected it. So far as the evidence disclosed there was no act of commission or omission on the part of either of said defendants which was intended to or did injuriously affect the defendant company. The securing of the option and selling by Black was a transaction between him and Baldwin, with which the defendant corporation had nothing to do,

and was a transaction which the defendant corporation could not do. Black's act, therefore, was not inconsistent with any duty he owed as trustee to the corporation.

Rem. & Bal. Code of Wash., Sec. 3697;

Tait v. Pigott, 32 Wash. 344;

Barto v. Nix, 15 Wash. 568;

10 Cyc. 577, 578;

O'Neill v. Ternes, 32 Wash. 528.

A trustee may buy property of the corporation when fairly done, and for the purpose of protecting his own interest, when he acts in his individual capacity.

In Twin-Lick Oil Co. v. Marbury, 91 U. S. 587, the defendant, a director of the complaining corporation, loaned the company \$2,000 secured by a deed of trust. At a subsequent sale under this deed, the defendant purchased all of the property of the corporation. In an action brought four years later to have the defendant declared a trustee for complainant, on page 590, the court said:

"If it be conceded that the contract by which the defendant became the creditor of the company was valid, we can see no principle on which the subsequent purchase under the deed of trust is not equally so * * * Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he loaned his money."

In Cowell v. McMillin, 177 Fed. 25, 39, (C. C. A. Ninth Circuit), in discussing a contract made by a director with the corporation, the court said:

"Thus, the case is brought within the rule recognized by the Supreme Court of the United States, namely, that where the director has acted with that candor and fairness which equity imposes as the guide for dealing be-

tween him and the corporation, and the transaction is open and free from blame, the director is not forbidden from making a contract with the corporation, or from entering upon a transaction in which he is personally interested;”

citing *Twin-Lick Oil Co. v. Marbury*, *supra*, and other authorities.

In *Marks v. Merrill Paper Co.*, 203 Fed. 16, 20, the court said:

“The authorities are numerous and controlling to the effect that the mere fact that the sale of property of one corporation to a new corporation, the majority of whose governing officers are the same, will not per se vitiate the sale. The question is always one of good faith and fairness, except in cases where public policy intervenes. The facts in the present case bring it within the language of the court in *Harte v. Brown*, 77 Ill. 226:

‘The stockholders had been called together, and they were urged to make advances in proportion to the stock they severally held, and thus relieve the company and preserve its existence, but this they refused to do; and as it could not be preserved, and must come to an end by a sale under the power in the trust deed, no reason is perceived why appellants might not become the purchasers at the sale.

‘They were under no moral or legal obligation to advance their own means, pay the debts, and preserve the property for the use of the other shareholders, who had declined to join in making pro rata advances to relieve it from debt.’”

See also,

Janney v. Minnesota Ind. Expo., 82 N. W. 984;

Saltmarsh v. Spaulding, 17 N. E. 316;

Allen v. Gillette, 127 U. S. 589.

A written notice was sent to all the stockholders asking that pro rata advances be made for the purpose of preserving the property. The stockholders did not respond. The plaintiff personally declined to make any advance. The defendants Black and Bell can not be "deprived of the only means which his contract gave him of making his debt out of the security on which he loaned his money."

The plaintiff knew long prior to bringing this action of the option and subsequent sale; and knew that the contract by Black permitting the Trout Creek Copper Company to do certain work on the property was ratified by the defendant company. The plaintiff with the trustees of the defendant company entered into a written stipulation settling an issue arising out of said contract more than four years before the bringing of this action. The defendant company would not be permitted to raise an action on that account, and the plaintiff does not occupy a stronger position than would the defendant company.

10 Cyc. 963;

28 Am. & Eng. Encyc. Law, 970.

In *Twin-Lick Oil Co. v. Marbury*, supra, the Supreme Court of the United States, on page 591 said:

"The doctrine is well settled, that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years as applied to every case, like the statute of limitations, but must be decided in each case upon all the elements of it which affect that question. These are generally the presence or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale and of the facts which render it avoidable, the permanent or fluctuating character of the subject-matter of the transaction as affecting its value, and the actual rise or fall of the property in value during the period within which this option might have been exercised."

After stating that the plaintiff had taken no action for four years, while the defendant had been putting his skill, energy and money in the enterprise to make his purchase profitable, the court concludes:

“We think, both on authority and principle—a principle necessary to protect those who invest their capital and their labor in enterprises useful but hazardous—that we should hold that plaintiff has delayed too long.”

In *Rothchild v. Memphis & C. R. Co.*, 113 Fed. 476, the minority stockholders did not bring an action until seventeen months after the sale at which the majority stockholder bought the property, and the court held that the complainants were guilty of laches. The plaintiff waited more than three years after confirmation of sale before bringing this action.

The authorities cited by the plaintiff are merely to the effect that a court of equity is not governed by the statute of limitations, that a mere lapse of time will not impute laches, and that the court is not bound by hard and fast rules in the determination of what will constitute such laches as will bar a recovery.

19 Am. & Eng. Encyc. of Law, 162;

15 Am. & Eng. Encyc. of Law, 1206;

Michoud v. Girod, 4 Howard, 4 How. 504, 561;

Sullivan v. Portland, etc. R. Co., 94 U. S. 806;

Stearns v. Page, 7 How. 819;

Gladden v. Kimmel, 99 U. S. 202;

Payne v. Hook, 74 U. S. 430;

Stevens v. Grand Central Mining Co., 133 Fed. 28;

Burns v. Cooper, 140 Fed. 279;

Davis v. Louisville Trust Co., 181 Fed. 22;

16 Cyc. 152, and cases there cited;

Street's Federal Equity Practice, Sec. 211, 212.

It is unnecessary to determine to what extent a court of equity, while not considering itself bound by a state statute of limitations, will rely upon such a statute for aid in determining a doubtful case, because I am convinced from the facts and circumstances here presented that the plaintiff has been guilty of such laches as should preclude his recovery by the operation of the rule as laid down in *Twin-Lick Oil Co. v. Marbury*, supra, without resort to the statute of limitations. While the court is not bound by hard and fast rules, yet no such case is here presented as would justify the court in disregarding the rules which have been laid down merely because it is recognized that a wide discretion is vested in the court which applies them.

I am further of the opinion that the action of the state court in approving the claims of the defendants Black and Bell over the objections of the minority stockholders, and in confirming the sale after similar objections had been made, is *res judicata* of this suit. The same questions were involved and were necessarily determined by the court when, notwithstanding the objections made, it approved the claims and confirmed the sale. Counsel for plaintiff contends that the sale not having been confirmed, there was no presumption that the court would confirm it, consequently the cause of action did not arise until after the confirmation of the sale, and could not have been determined before the confirmation. The rule upon which he relies is stated in 23 Cyc. 1314, as follows:

“A judgment is not and cannot be an estoppel as to facts which did not occur until after the judgment was rendered and which were not involved in the suit in which it was rendered.”

It seems that counsel has confused the acts of the defendants with the act of the court. The acts of the defendants charged by the plaintiff as affording ground for

relief occurred prior to the confirmation, and the confirmation was a determination by the court that those acts were not sufficient to prevent a confirmation of the sale which the plaintiff is here seeking to set aside. The only distinction between that action and this is that there the plaintiff was attempting to prevent the court from doing that which he asks this court to undo. The same elements entered into the court's determination there as are involved here—the prior acts and conduct of the defendants, and no additional element was introduced by the act of the court in the confirmation. The relief here sought is in effect the setting aside of the judgment of the state court in confirming the sale. The fraud upon which the hope of such relief is based was involved in the issues raised in the state court and was necessarily determined by its judgment.

Intermela v. Perkins, Filed in this court, April 20, 1914, Fed.;

United States v. Throckmorton, 98 U. S. 61;

Vance v. Burbank, 101 U. S. 514;

Cromwell v. County of Sac, 94 U. S. 351;

Stockton v. Ford, 18 How. 418;

Mitchell v. First Nat. Bank Chicago, 180 U. S. 471; 480;

2 Black on Judgments, 504;

Willoughby v. Chicago, etc., 25 Atl. 277;

Hearst v. Putman, 77 Pac. 753.

If the contention of the plaintiff should prevail in this instance, in all cases where a judgment is sought to be set aside on the ground that it was obtained by fraud, a plaintiff might contend that the fraud of the plaintiff

was not committed until the judgment was entered, and yet the Supreme Court of the United States has laid down very clearly the rule that relief cannot be had unless the fraud is extrinsic or collateral, and that if it was involved in the issues it was determined by the judgment.

United States v. Throckmorton, *supra*.

It is needless to discuss the further contentions of the parties. From what has been said the conclusion is inevitable that the complainant's bill must be dismissed.

Decree accordingly.

JEREMIAH NETERER, Judge.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, May 18, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern*

Division. (In Equity).

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL, and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Decree

This case come on to be heard at this term, and was argued by counsel; and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows, namely:

That the above entitled action be, and the same hereby is, dismissed with prejudice.

That the defendants, W. W. Black and Frank L. Bell have judgment against the complainant for their costs and disbursements in this action, to be taxed as provided by law.

Done in open Court. Dated this 23d day of June, 1914.

JEREMIAH NETERER, Judge.

To the making and entry of the foregoing decree and each and every part thereof the complainant excepts and his exceptions are allowed.

JEREMIAH NETERER, Judge.

O. K. as to form, Walker.

Indorsed: Decree. Filed in the U. S. District Court, Western Dist. of Washington, June 23, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

[Excerpts from Petition for Rehearing]

United States District Court, Western District of Washington, Northern Division.

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING COMPANY, Defendants.

No. 2112

Petition for Rehearing

Comes now the complainant and respectfully petitions the Court for a rehearing and re-consideration of the above entitled cause on the grounds and for the reasons hereinafter set forth.

The issues presented and the legal questions involved in this litigation are both numerous and complicated and a study of the opinion rendered leads us to feel that in the limited time allowed for the preparation of briefs some of the points involved were not as fully and clearly presented as fairness to Court and the parties litigant demands. Hence, we request the privilege of presenting, as briefly as we may, a single point which we deem to have been insufficiently presented.

The complaint, in the case of Bell vs. Sunset Company in the Superior Court of Snohomish County, was the ordinary form for the foreclosure of a mortgage, though requesting the appointment of a receiver pendente lite. The entire record of the Snohomish County case is in evidence as complainant's Exhibit "B," from which it appears that a temporary receiver was appointed ex parte at the time of the filing of the complaint without any proper or sufficient service having been had on the Sunset Company (the only service attempted having been the service of a twenty day summons on an officer of the

Company in the City of New York). Thereafter, on the appearance on behalf of the Company of Attorney Locke, the appointment of said receiver was attempted to be made permanent by an order of the judge pro tem, though no additional bond was ever given by the receiver. Thereafter the foreclosure phase of the suit was abandoned, leastwise no further steps were taken in that direction and the property here involved was subsequently sold by the receiver under an order of Court purporting to authorize such sale.

It is our contention that a receiver appointed in a real estate foreclosure proceeding in this State cannot be legally authorized or empowered to sell or convey the mortgaged property, nor, indeed, can a receiver be appointed at all in a foreclosure suit, except in cases of emergency to prevent waste and for the preservation and protection of the mortgaged property during and pending the orderly course of the foreclosure proceedings, which includes the sale of the property under a decree of foreclosure in the manner provided by statute.

As heretofore noted and as clearly appears from the record, no service of summons was ever had on the Sunset Company in the State of Washington, though after the appointment of a temporary receiver the record shows that one D. W. Locke filed a notice of appearance as attorney on behalf of the corporation and entered into a stipulation for the appointment of a judge pro tempore and on the same day an order was entered by said judge pro tempore making the appointment of the receiver permanent. No defense or subsequent appearance was made on behalf of the corporation.

Attorney Locke testified that the complaint and summons in said cause were placed in his hands by defendant Black, who, while stating that there was no defense whatever to the suit, nevertheless, requested him to enter an appearance on behalf of the corporation. This testi-

mony is in all respects confirmed by the testimony of Black, himself. Since there was no jurisdiction in the Superior Court in the absence of a voluntary appearance we confidently assert that no jurisdiction was conferred through the appearance made by an attorney under the circumstances disclosed in this case. * * *

We therefore, urge in conclusion that the entire proceedings had in the Snohomish County Court were and are absolutely void. Summing up the foregoing argument inversely; first, for the reason that the apparent jurisdiction of the person of the defendant corporation was conferred through the action of defendant Black exercised beyond the scope of his authority for the deliberate purpose of forfeiting the rights of his corporation. Second, though it be assumed that jurisdiction of the Sunset Company was obtained, yet the Court had no power, jurisdiction or authority to authorize or confirm in a foreclosure proceeding a sale by the receiver of the mortgaged property.

Respectfully submitted,

O. C. MOORE,

GEORGE H. WALKER,

Solicitors and Counsel for
Complainant.

Received a copy of the within Petition for Rehearing due and timely service whereof is hereby admitted this 11th day of June, 1914.

ROBT. McMURCHIE,

L. L. BLACK,

Attorneys for Defendant.

Indorsed. Filed in the U. S. District Court, Western Dist. of Washington, June 23, 1914, Frank L. Crosby, Clerk, By E. M. L. Deputy.

[Decree and Order Denying Petition for Rehearing]

United States District Court, Western District of Washington, Northern Division.

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, Defendants.

No. 2112

Filed July, 1914.

GEORGE H. WALKER,

O. C. MOORE,

For Complainant.

L. L. BLACK,

ROBERT McMURCHIE,

For Defendants.

NETERER, District Judge:

After a careful consideration of the pleadings and the record in this case, I am of opinion that the petition for rehearing is not well founded and should be denied.

It is so ordered.

JEREMIAH NETERER, Judge.

Indorsed: Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 28, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern*

Division. (In Equity).

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Statement of Facts

Be it remembered, that the above entitled cause came regularly on for hearing in the above entitled court on April 12, 1914, before the Hon. Jeremiah Neterer, Judge of said court presiding; plaintiff appearing in person and being represented by his attorneys, Geo. H. Walker and O. C. Moore, and the defendants, W. W. Black and Frank L. Bell, separately appearing in person and W. W. Black appearing also by his attorneys, Robert McMurchie, J. A. Coleman and Lloyd L. Black, and defendant, Sunset Copper Mining Company, a corporation, appearing not.

Whereupon, said cause being called for trial, proceedings were had and testimony was taken as follows, to-wit:

John Sandidge, a witness called on behalf of the complainant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. WALKER:

I am a lawyer and reside in Everett. I was attorney for plaintiff in the case of Frank L. Bell vs. the Sunset Copper Mining Company in the Superior Court of Snohomish County, Wash., for the foreclosure of a mortgage

wherein a receiver was appointed for said corporation and its property sold by said receiver. The matter of my representing the plaintiff in said suit was first mentioned to me by Judge W. W. Black. He told me that Mr. Bell contemplated such an action and that he had recommended to him that he employ me in the matter, and I think he told me that Mr. Bell would prepare and serve the complaint in New York and then forward it out here to Everett. This was subsequently done and I took charge of the case from that time on and looked after it as an attorney. I could not say without seeing the records just what papers I prepared in the case. Mr. Bell, according to my recollection, came to my office and dictated some affidavits, and Judge Black dictated an affidavit that he made. During the course of the proceedings I talked the case over a number of times with Judge Black and generally discussed all steps of importance in the case with him. The defendant corporation was represented by W. D. Locke. My recollection is that there was no answer filed in the case and I do not recall that there was any issue made between Mr. Locke and myself. I think I discussed the claims filed by the creditors with Judge Black, and, while he said there were some claims that were not just, he did not personally care to object to them. My recollection is that there was no contest about any of the claims between myself and the attorney for the corporation. I think Judge Black stated that he had held Bell off from foreclosing the mortgage as long as he could and that he could not make any defense.

CROSS EXAMINATION.

BY MR. McMURCHIE:

Mr. Fogarty was appointed receiver and my reference was to claims presented to the receiver. There was nothing, so far as I observed, in the conduct of Judge Black that indicated that he wanted to be unfair to any of the stockholders of the corporation. My recollection is that Judge Black said the corporation had no defense to the foreclosure suit and I knew of no defense to the foreclosure or to the appointment of a receiver. There was no suggestion that a defense could be made, except what is made in the record itself.

RE-DIRECT EXAMINATION.

BY MR. WALKER:

I understood that Judge Black was the manager and a trustee of the defendant corporation. He took no steps towards defending the action so far as I know. Judge Black and myself have been close personal friends. I was more or less familiar with the affairs of the Sunset Company before this suit arose and I am not sure but that most of the things that I have been testifying that Judge Black told me, were things that he told me before this suit arose. I do not remember that he talked much to me about it after the suit was instituted. I think I had the knowledge that I had gotten from him before that time.

D. W. Locke, a witness called on behalf of the complainant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. WALKER AND MR. MOORE:

My name is D. W. Locke. I reside at Everett and I am an attorney at law, having practiced in Everett since 1906. I was attorney for the Sunset Copper Mining Company in the case of Bell vs. the Sunset Copper Mining Company in the Superior Court for Snohomish County for the foreclosure of a mortgage. I was retained by Judge Black to represent the defendant corporation in that suit and he told me to represent the Mining Company in the foreclosure proceedings. After having been retained as attorney I looked over the complaint carefully and got the records of the Company, such as were at hand, and investigated whether or not the trustees had authority to execute the mortgage set up in the complaint. I was employed as attorney to look after the interests of the defendant in the foreclosure proceedings and I took that complaint and looked over it just as carefully as any other case that was put in my hands, and I made up my mind as attorney that we had no defense and I did not make any. I do not recall anything about the presentation of any claims to the receiver. I have known Judge Black quite a number of years and he and I have been on friendly terms. I remember Fogarty was appointed receiver for the company and I think he was receiver at the

time I was retained. It was stipulated between myself and the attorney representing plaintiff that a judge pro tem be appointed and I think I deferred to the wishes of my client, Judge Black, as to who the judge pro tem should be. Judge Black suggested that Mr. Anderson be appointed and that was agreed upon.

“Q Examine page 18 of Plaintiff’s exhibit B which I now hand you, being a transcript of the records and files in the case of Bell against the Sunset Copper Mining Company in Snohomish County. Have you read it?

A Yes, I have read it.

Q Now, is it not true that the appearance indicated on this page 18 is the only appearance you ever made in the case?

A I only made one appearance in the case.” (Tr. 32).

After studying the allegations of the complaint and the records of the Sunset Copper Mining Company, which I got from its office and from the receiver, I was satisfied there was no defense to the foreclosure of the mortgage and subsequently I made an appearance in the case, as shown by the record. I wanted my appearance in so I could take whatever steps were necessary. It is my recollection that at least two or three weeks transpired, after Judge Black told me to act as attorney, before the case was tried. I was in Court at the time of the entering of the decree by Judge pro tem.

Mr. J. B. Fogarty, a witness called on behalf of the complainant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. WALKER:

My name is J. B. Fogarty. I am a lawyer and have lived at Everett, Wash., since 1894, and have been engaged in the practice of law during practically all that time. I have known Judge W. W. Black during my entire residence in Everett. During the past eight or ten years our associations have been rather intimate in a political way. I know

Judge Black like I know a great many lawyers in our part of the country. Judge Black was Judge beginning in 1905 up to 1913. I was not intimate in a professional way beyond trying lawsuits in his Court. I was receiver for the Sunset Copper Mining Company in the case of Frank L. Bell against that Company. The first suggestion of my becoming the receiver was made to me by Judge Black, who asked me if I would serve if appointed and I told him I would. I sold the property of the Company as receiver to Judge Black and Frank L. Bell and certain claims theretofore filed and allowed were accepted in payment of the purchase price. I do not think there was any contest over the allowance of any claims filed. I do not remember if there was any. I will put it in that way. I remember a proceeding in court one day before a judge pro tem in which witnesses were examined and notes were introduced in evidence. I think that was the day the order appointing the receiver was made permanent. I remember Mr. Locke and Mr. Sandidge were there, and it is my recollection that they introduced the notes and mortgage in the evidence and went through the form of proving them. There was a trial in Court on a hearing of some sort. They proved the notes and mortgages. After I was appointed permanent receiver certain claims were presented to me as receiver. I made an investigation as to the legality of all of the claims except two. One was the claim of Mr. Bell that was based on a judgment of the Federal Court rendered in New York. The other was the claim of Mr. Bell based upon the Baldwin notes and mortgage, for which a judgment had been rendered in the case of Bell against the Sunset Copper Mining Company in Snohomish County, Washington. I believe I investigated all the other claims. I talked with Judge Black, and with attorneys of the parties, with Mr. Rudabeck and with his attorneys, Hathaway and Alston, about these matters during the receivership. I talked with Mr. Rudabeck and his attorneys, Hathaway and Alston, in regard to contingent liabilities or liabilities of Mr. Baldwin or Mr. Bell or others to the corporation. I investigated to see whether or not the claim on behalf of the Sunset Copper Mining Company existed as against Mrs. Baldwin. I read the constitutional provision and looked up some law on the matter and consulted with Hathaway and Alston, who represented Mr. Rudabeck, and I petitioned the Court for directions what to do. There was quite a full hearing upon my petition. Mr. Rudabeck was represented by counsel, Mr. Black, Mr. Locke

and Mr. Sandidge were there and my recollection is that evidence was taken. The whole matter was gone into in regard to the liability of the Baldwin estate or the liability of Mr. Bell to pay the alleged unpaid part of the stock held by Baldwin and on the part of anyone who bought stock and paid less than par value for it. I understood that hearing was before Judge Still on the merits of the proposition. Rudabeck and his attorneys, Hathaway and Alston, made a demand on me to begin an action to recover on these contingent liabilities, and without consulting anybody I petitioned the Court for directions. A hearing was held on that petition before Judge Still. Mr. Rudabeck, claiming to be a stockholder in the Sunset Copper Mining Company, was present and represented by counsel. Mr. Locke representing the Copper Mining Company and Mr. Sandidge representing the plaintiff, and Judge Black were there. Argument was made before Judge Still. The demand of Mr. Rudabeck to me was made part of my petition. I believe the order appearing at page 49 of this Exhibit was the order fixing the time for hearing upon my petition, and directing Rudabeck as a stockholder, and other persons interested, to appear at the time stated.

THE COURT: I will state in the record here that I will assume that these are copies of the orders.

THE WITNESS: It is my recollection they are copies.

MR. WALKER: We do not dispute the record at all.

I did not investigate as receiver the claim presented by the defendant Bell, because one of the claims was a judgment of a Court of record and I did not think it could be impeached, it seemed to be fair on its face, and the other was a judgment of the Superior Court of Snohomish County, in which this proceeding was pending and in which I was appointed receiver.

Mr. W. W. Black, a witness called on behalf of complainant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. WALKER:

My name is W. W. Black and I am one of the defendants in this action. I reside at Everett, Wash., and was judge of the Superior Court for Snohomish County from January 1905 to January 1913.

I was a trustee of the Sunset Copper Mining Company practically all the time since 1903 and I claimed to be general manager of the Company and acted in that capacity during all that time, though my authority to act was sometimes disputed by the eastern officers and stockholders. Most of the trustees of the Company lived at Glens Falls, N. Y. A stockholders' meeting was held Feb. 8, 1904, and another on January 14th, 1908, and I don't know if there were any stockholders' meetings between those dates. My impression is that there was an annual meeting in each year, but I cannot tell exactly. I did not do the physical work of writing up the minutes as a rule. I employed my clerk. I was the secretary of the Company in 1904 and for a good part of the time subsequent to that date. From time to time resolutions directed against me were adopted and sent to me by the trustees in New York to the effect that I should not act for the Company. I did not place these resolutions in the minutes of the Company because I did not want them to appear there. The Trustees in New York sent me copies of the minutes of the meetings or at least some of them. I don't know whether they sent me all of them or not. When I received these minutes I kept them among the papers, but did not paste them in the minute book. I kept all that they sent me among the papers. I have collected and brought into Court all of them that I can find. I kept a lot of such records at the Court House while I was Judge of the Superior Court, and we had a fire which burned up the entire Court House and most of my papers, except bunches of papers here and there saved by the lawyers at the time of the fire. I did not paste these minutes of meetings held by eastern stockholders in the minute book nor did I direct my clerk to do so for the reason that I had an idea that these eastern people were conspiring against me. I had no opportunity to be present as a board member and I was always guarding myself, so I kept them faithfully, but I did not paste them in the minute book. For the most part the stock-

holders' meetings were held in Everett, Washington. I have an impression that some of them were held in the east. A majority of the trustees lived in New York. I insisted on having a majority of the board residents of Washington, but Mr. Baldwin insisted on having a majority of the board who resided in New York State. Mr. Baldwin had under his control stock enough to enable him to elect all the trustees and we could not help ourselves. The Baldwins and the Baldwin family and their friends held about 1,750,000 shares and Baldwin always got proxies for that. Mr. and Mrs. Baldwin had at least more than 1,500,000 shares of stock. They were always in a position to control the election. The corporation was originally capitalized for \$2,000,000 divided into two million shares of the par value of one dollar per share. The Company had no money and no assets and the only way we could raise money to develop the property was to try to get somebody to buy stock and we had no stock belonging to the company and therefore in 1903 the capitalization was increased to \$3,000,000. W. H. Baldwin of Glens Falls, N. Y., bought 200,000 shares of the new capitalization and paid the Company \$5,000, $2\frac{1}{2}$ c a share, therefor, which is what the Company agreed to sell it for and what he agreed to pay for it. We made a bargain with Mr. Baldwin and got all the money out of him that we could get and a good deal more than we could have received from anybody else. The market price of the stock was below $2\frac{1}{2}$ c per share. In fact, there was no market for it at any price. The Company never received any further consideration for the 200,000 shares so issued to Mr. Baldwin. As a basis for increasing the capitalization I turned into the Company a number of mineral claims, I think some fifteen or twenty. Part of these claims were known as the Mountain Side Group for which I had given 6,000 shares of stock of the Company and about \$1,100 cash, and the Company in turn issued me 6,000 shares of stock and paid me about \$1,100.00 and some odd dollars in cash. The Mountain Side Group was considered then a very valuable group and was immediately contiguous to the other property of the Sunset. I had what I thought was a moral claim upon the group. I felt I had an interest in them. I felt that I had some sort of a hold on account of a cloudy title. I talked the matter over with the Company and told them that by reason of my being connected with the Mountain Side Group I could probably buy them, and that I would buy them and turn them over to the Company for the money I would have to advance. I did this.

The Company gave me the money and stock I had advanced. I was trustee of the Company, working for the Company's interest and did not receive any profit or anything for my interest, or supposed interest in the Mountain Side Group. I made the best trade for the Company that I knew how. We got the Mountain Side Group and other claims as a basis for the increase of the capital stock. I made no profit out of the transaction. There was no subscription for the increased capitalization provided for in 1903. The stock was increased from 2,000,000 to 3,000,000 shares but not subscribed. The mineral claims of the Sunset Company were bought at the receiver's sale by Mr. Bell and myself for \$40,000, \$2,000 in cash and the cancellation of \$38,000 of the claims filed by Mr. Bell and myself with the receiver.

In regard to the judgment obtained by Mr. Bell in the United States Court, allowed by Mr. Fogarty as a receiver, I talked to Fogarty about it, and told him I did not want Mr. Bell to get that much for his services, but that it made no practical difference whether this claim was allowed or not because I knew the Company was bankrupt. I did not direct any resistance to be made. We understood between ourselves that the assets of the Company were not worth the amount of all the claims anyway. I believed that legally Mr. Bell had the best of us. He had been employed as attorney by Baldwin, the President of the Company. I had a claim against the Company for more than Ten Thousand Dollars. Part of it was for a judgment and part of it was for money advanced for which the Company had given me a mortgage, and part of it was for other money advanced not secured by mortgage, and part of it was for salary. And I could not see any practical difference whether Bell's judgment was allowed or not.

CROSS EXAMINATION.

BY MR. MC MURCHIE :

I never at any time knew of any defense in law or equity in favor of the Sunset Copper Mining Company against the mortgage and notes executed to Mrs. Ellen C. Baldwin, the surviving widow of W. H. Baldwin, deceased, and held and foreclosed upon by Bell in the suit wherein property of the Company was sold by a receiver.

I am now of opinion, on further reflection, that stockholders' meetings were held annually between 1903 and 1908, and that the minutes thereof, made under my supervision, were burned in a fire which destroyed the Court House in which my office was located.

Mr. Baldwin became identified with this mining property in 1903 and following this time the mining company received from time to time from Mrs. Ellen C. Baldwin the full amount mentioned in the mortgages and in the notes sued upon by Bell in the suit of Bell vs. Sunset Copper Mining Company in Snohomish County, Washington. This money was actually received by the Company and used by it in developing its mines and in furtherance of its business. Up to August or September, 1904, about \$30,000.00 was spent in putting in machinery and developing the property. After that time the active work of mining was practically at a standstill, except to do the assessment work to protect the claim which was always at least Thirty-six Hundred Dollars (\$3600.00) a year and generally more. In 1906 I personally advanced the larger part of the money to do the assessment work, receiving a mortgage upon the property for part of the amount advanced by me personally. In 1908 Mr. Bell and I furnished all of the money with which to do the assessment work, and have furnished all money since that time for doing assessment work; caring for property; surveying and obtaining patents and expenses connected therewith.

In the summer of 1907 Mr. Bell and I locked horns. I found that Mr. Bell had purchased the mortgages and notes given by the Company to Mrs. Ellen C. Baldwin and Mr. Bell wanted to foreclose his mortgages. The Company had no money and he did not want to advance any. I went to the City of New York to see Mr. Bell and did see him after he had written me he intended to foreclose these mortgages. I spent several days with him with reference to the affairs of the Sunset Copper Mining Company, including the matter of his foreclosing the mortgage. I was opposed to his foreclosing the mortgage. I then told him if he attempted to foreclose that mortgage that I would give him all the fight that was in me. I tried to impress upon him that I was quite a fighter. I would make it cost him all I could and would delay the matter and do everything to stick pins in him if he went ahead on this line. I told Mr. Bell that if he acted right and did not foreclose the mortgage until I

was satisfied that he had given me a reasonable time to see if I could interest other people and be able in some way to take care of the notes secured by mortgage, then I would not raise any objections and I would not try to make it expensive for him and my attitude would be changed if he would give us the time that I otherwise could get by delay. As a result Bell agreed to wait until I had a reasonable opportunity to determine whether I could secure any money or not, and Mr. Bell advanced half of the money to do the assessment work in the year 1908 and I advanced the other half and Mr. Bell refrained from foreclosing for more than a year. When he did begin the foreclosure I did not know of any defense of any kind to his action for I knew the corporation had received and expended the money mentioned in the notes. The Company had no other resources and could not do its assessment work.

Mr. G. J. Buchler, a witness called on behalf of the complainant, after being first duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. WALKER

I am the complainant in this action and my name is Gustavus J. Buchler, and I am a citizen and resident of the State of Penn. I own 58,250 shares of the capital stock of the Sunset Copper Mining Company acquired between March 1898 and March 1899.

I first learned that the Sunset properties were to be sold from an Index, or Everett paper, sent to me by Mr. Holmes on or about the 23rd day of February, 1909; that was the first knowledge that I had that Bell had brought suit against the Sunset Copper Mining Company in Snohomish County. I afterwards learned that the property had been sold by a letter received from Schuyler Duryea written from Everett dated April 6, 1909, after the sale had been confirmed. I learned from the same source that Black and Bell were the purchasers.

I thereupon communicated with a number of stockholders in regard to the institution of a suit to recover the properties of the Company, and subsequently, fearing that the properties would be entirely lost, I instituted this suit to safe-guard the interests of the Company.

CROSS EXAMINATION.

BY LLOYD L. BLACK :

I received a letter from W. W. Black dated August 8th, 1903, in which I was notified that there would be a stockholders' meeting on the 22nd August 1903, for the purpose of increasing the capital stock from \$2,000,000 to \$3,000,000. I declined to sign the proxy enclosed. I received a letter from W. W. Black dated August 22nd, 1903, being defendant's Exhibit 6. I also received the paper, marked Exhibit 7 and 8. The words "answered January 9, '04" and "answered February 7, '04" were written by me. The figures written on the letters are the dates of my answers to those letters.

In 1907 I secured an attorney for the purpose of bringing suit, because the stock had been increased from \$2,000,000 to \$3,000,000. I was informed in the year 1908 of the fact of the pendency of the foreclosure suit on the Bell mortgage or the Baldwin mortgage. I knew that the property was to be sold at a receiver's sale, before the sale. I knew before the sale of the property that Mr. Bell had secured a judgment in New York, and I knew before the sale of the property that it was to be sold to pay the debts. I knew in 1907 of the existence of the mortgages to Mrs. Baldwin and knew of the notes. I had been informed in 1908 of the existence of the mortgages and the debts owing by the Company. I received this information from defendant Black. I took an unexpired option for the purchase of a majority of the stock, being Mrs. Baldwin's interest, together with the claims Mrs. Baldwin had against the Sunset Copper Mining Company. Mr. McGhinidy, Mr. Holmes and Mr. Powers joined with me in obtaining this option. This option was received from Frank L. Bell by Judge Black, his attorney-in-fact.

I saw a circular from Mr. Bell sent out to another stockholder stating that the mortgage would be foreclosed unless the stockholders would go in with him and give pro rata to the Company to do assessment work. I also received a letter from Mr. Holmes about this circular.

At the time I took the option just referred to, access to the books of the Company at Everett was offered me by the defendant Black, but at the same time he stated that the records were not complete as the safe had been broken open and the records removed.

From February 1908 until I left Everett I had business relations with Mr. Holmes. After leaving Everett I kept up constant correspondence with him until after the sale of the property, but he was not acting as either my attorney or my agent. I received a letter from Mr. Holmes of February 18th, 1908, informing me that Mr. Rudabeck, as stockholder, was trying to stop either the sale or confirmation of it. I knew about the time of the sale or shortly after from correspondence with Schyler Duryea that Mr. Rudabeck had made objections and what those objections were.

On March 27, 1909, I telegraphed Judd, an attorney of Everett, with whom I had had correspondence in 1908 and 1909 by letter and telegram, relative to the pendency of the Bell suit and the receivership, that I was in favor of taking the matter to the Federal Court. At the time I sent that telegram to Mr. Judd I think I knew that the property had been bid in by Black and Bell. In 1908 when I purchased the option before I left Everett I looked into the affairs of the Company to find out how valuable the option was, and I went to the Court House and received a copy of the mortgage.

W. W. Black, produced as a witness in behalf of defendants, testifies as follows:

BY MR. MC MURCHIE:

During the course of the proceedings in the Superior Court with reference to the foreclosure of the Bell-Baldwin mortgages and with reference to the appointment of a receiver and the proceedings of the receivership, I was Judge

of the Superior Court and felt that I was disqualified from acting in that case. Judge Frater, Judge Still and Judge Joiner were called in to preside in hearings held in the course of the litigation, and F. A. Anderson was appointed Judge pro tem. The judges were selected without any suggestion from me as to who were to be selected. It was very hard to get judges from other counties at that time. I told Mr. O. C. Gaston, my Court Stenographer, to get what Judges he could. In regard to the appointment of Mr. Anderson as judge pro tem, Mr. Gaston reported to me that he was unable to get another judge and the attorneys for the plaintiff and defendant stipulated that Mr. Anderson should act as Judge pro tem. I did not have anything to do with his selection. When he was selected I approved the selection. This being necessary for me to do under the law of this State as Judge of the Superior Court. After the property was purchased at the receiver's sale I expended a few hundred dollars more than Mr. Bell expended. The money expended by Mr. Bell was forwarded to me and I spent a like amount and some more; all of which was expended on the Sunset in doing assessment work and securing patent. Previous to the foreclosure I had given Mr. Buchler an option to purchase the Baldwin stock, notes and mortgage. During this period we expended a little over Thirty-six Hundred Dollars a year for assessment work. Previous to the foreclosure of the Bell mortgage and the appointment of a receiver Mr. Buchler asked me to let Mr. Bell foreclose the mortgage. He wanted Bell to foreclose the mortgage, buy the property and let him sell it, and I refused to do so. At all times I gave Mr. Buchler all the information about the Sunset he sought. I turned over the books to him and everything for examination. I think Mr. Buchler knew, when he was at Everett, practically everything that I knew about the Sunset. None of the money advanced by me or by Mr. Bell has ever been repaid directly or indirectly and we never received anything from the mine. Neither Mr. Buchler or any other stockholder or any other person has paid or offered to pay any money I have expended.

In regard to the judgment obtained by Mr. Bell in the Federal Courts of New York State I had no knowledge of the pendency of the action until it was sent out to be proved before the receiver.

I kept minutes of the meetings of the stockholders and I assume they were destroyed in the fire when the Court House burned. When I testified before I was hazy, but I got to thinking the matter over and I remembered then where meetings were held and that the minutes were kept and it was my habit to keep them at the Court House.

Frank L. Bell, a witness for defendants, being first duly sworn, testified as follows:

BY MR. MC MURCHIE:

I am one of the defendants in this action, and live at Glens Falls, N. Y. I am an attorney at law and after the death of Mr. W. H. Baldwin Mrs. Baldwin came to me and said that her husband told her that if he died, or anything happened to him, to come to me and I would protect her. I knew many of her relatives and they came to me and asked me to assist her and I finally consented to do so and so I acted as her attorney and severed my connection with the company. I took the stock, mortgage and bonds as a protection to Mrs. Baldwin. Mrs. Baldwin had made an absolute assignment of the mortgage, notes and stock to me and she had no moral or legal obligations from me to pay her anything. While it was in my name and I had the unqualified right to sell or dispose of it it was my intention to treat Mrs. Baldwin exactly as though it was all in her name and such intention has existed from then till now. The certificates representing Mrs. Baldwin's stockholdings in the company were endorsed in blank and turned over by her to me, though they have never been transferred on the books of the Company, and I now find that one certificate for two hundred thousand (200,000) shares issued in 1904 was never really delivered to me.

I have been a practicing attorney in the State of New York for twenty years and I am acquainted with the laws of the State of New York with reference to the rights of corporations not organized under the laws of the State of New York, doing business in that State, and the right of creditors of such corporations to bring actions in said

State in the Federal Court, and I am familiar with the holdings of our Court in that respect. The failure of a corporations to file a copy of its certificate of incorporation with the Secretary of the State of New York or to obtain a license authorizing it to do business in the State of New York, do not render a contract made by the corporation within the State of New York illegal or void. The New York courts and the United States Supreme and Federal cases hold that the only effect of the statute is to deprive the corporation which fails to file a copy of its charter and obtain a license, of the right to sue in the courts of the State; that in all other respects the contract is perfectly valid. The case in the 199 New York, I think for the first time holds squarely that the corporation will not be heard when sued upon a contract made by it, to set up its default as a defense.

In August 1907, I was the owner of the notes and mortgages that have been referred to herein as the Baldwin mortgage. I had an interview with the defendant Black in the City of New York at about that time and told him that I was willing to put up money to do the assessment work, survey the claims, obtain patents in the proportion that the stock held by me bore to the total amount of stock held by other stockholders, if they would put up their proportion of the amount. If they did not I would foreclose the mortgage. The judge said he would fight it and would delay it and make it just as expensive for me as he could. Finally it was agreed between us that I would give him a reasonable time to arrange matters. I insisted that that should be done within a year. He would not agree to that, but I was positive that a year was enough and told him I should proceed after that time unless the other stockholders would contribute their part. He said if I would make it a reasonable time he would not make it expensive for me. I did not ask him to assist me nor cooperate with me, nor to lend me any aid, and he did not agree to it, and I have never asked him for aid, and in all my dealings with him there has been but one time that our minds met and agreed. I did forbear from foreclosing the mortgage for over a year. I made an effort to ascertain whether the other stockholders would do anything to protect their interest in the property. I sent a circular letter to all of the stockholders, including the complainant, stating what the condition of the company was, what was required in

the way of money, and that if the stockholders would contribute their proportionate part I would put up my share if a considerable number accepted the proposition. I received some sixty or seventy dollars and no more, and I returned that. I sent a number of these circulars to Mr. Buchler asking him to mail them to such stockholders in Philadelphia as he knew there. I think this was all done about November 10th, 1908. I saw Mr. Buchler in the summer of 1908 when he told me he had been to Everett and told me he had had an option on the Sunset property. I told him that I owned the stock and mortgages and notes formerly held by Mrs. Baldwin. I told him if the stockholders would not put up their proportionate share I would foreclose the mortgage and asked him to put up his share and he said he would not do so and would not put up another dollar and told me the other stockholders would not put up anything. Mr. Buchler then suggested that I foreclose the mortgage and let him handle the property after foreclosure. I refused to do this until I had made the offer to the other stockholders. The reason he wanted me to foreclose the mortgage he said was because he thought he could sell it as a whole but could not sell a controlling interest. I was not the attorney for the Sunset Mining Company at that time during the process of the foreclosure of the mortgage or the receivership suit. I severed my relation soon after April 1906. I never was a trustee of the corporation except for one day in Everett when they were making an exchange of trustees; some resigning, and they put me in to fill up. I was elected and qualified, and at the conclusion of the meeting resigned. I employed Mr. Sandidge to act as my attorney to foreclose the mortgage and institute this suit represented by Exhibit B. After I found that Judge Black could do nothing with the property, I wrote him to give me the name of some attorney who would foreclose the mortgage with as little expense as possible. I had met Mr. Coleman and wrote the Judge about him. The Judge wrote me that Mr. Coleman might be expensive and suggested among others Mr. Sandidge, whom I had also met and remembered. I employed Mr. Sandidge and drew a complaint and sent it to him. Mr. Sandidge changed the complaint in form and sent it back to me asking me to verify it, which I did, and returned it to him. I knew nothing of the appearance of Mr. Locke nor as to his being employed to act on behalf of the company until March 1909, when Mr. Locke told me something

about a claim against Baldwin. I told him that Mr. Baldwin was dead, that his estate had been settled and that there had been realized but a few hundred dollars. The estate had been settled and the total amount realized was between Twelve and Thirteen Hundred Dollars. I did not know that Mr. Fogarty was receiver of the corporation until I reached Everett.

The only time Judge Black and I agreed was the night before the sale when I talked to him about bidding on the property. We agreed that we would bid Forty Thousand Dollars which was substantially the amount represented by the debt secured by the Baldwin mortgages and notes and what we had advanced to the receiver on certificates to do the assessment work, and that if anybody bid more than Forty Thousand Dollars that we would let them have it. This is the only talk I ever had with the Judge upon any occasion or upon any subject when he agreed with me or co-operated with me. At other times he tried to get all out of me he could. There was no other bid made. After that in Everett we had a meeting with a number of the stockholders when Judge Black, in behalf of himself and myself, offered to allow all stockholders to come in and share in this bid, paying on the same basis that we did, Forty Thousand Dollars. I was present at the meeting and assented to it and would assent to it now. In making that offer I offered to throw off Ten Thousand Dollars represented by the judgment I had obtained in New York. I regarded my services a loss. In New York I had resisted a number of claims against the company. One was for Eight Thousand Dollars. Another claim of about Thirty Thousand Dollars. I settled these claims for Five Hundred Dollars. Of course I had to do with a great many other matters. I was familiar with the stock sold by Mr. Baldwin belonging to the company. He sold some stock for fifteen cents and accounted for the whole fifteen cents to the corporation. This stock was about Forty-three Thousand shares. The first I ever knew of Mr. Baldwin buying treasury stock at $2\frac{1}{2}c$ a share was on Friday last.

After the receiver's deed to myself and Black I, personally spent, in protecting the title to this Sunset property, Twelve Thousand One Hundred and Forty-five Dollars. This does not include interest. I have never received direct-

ly or indirectly any payment from the Sunset Copper Mining Company, or on behalf of the Sunset Copper Mining Company, for any services rendered by me as attorney for the Company, and have never been recouped or repaid in any amount for any sums of money advanced by me to the Company for its use and benefit, nor for any that has been expended since the receiver's deed was made. No offer has ever been made to me on behalf of the complainant or any of the stockholders for any money expended for the protection of the claims at that time. The Sunset Copper Mining Company executed an obligation in the form of a mortgage, agreeing to repay to Judge Black and myself any money we expended in behalf of the Company.

Lloyd L. Black, a witness for defendants, after being sworn, testified as follows:

BY MR. MC MURCHIE:

I am an attorney at law. I have had sole charge of all matters pertaining to the application for patents for the Sunset. The application was made about the 1st day of February, 1912. I attended to all the work, legal and otherwise. I had to hunt up witnesses and look after adverse claims put in by the Homestead Copper Mine, and a claim of the Northern Pacific Railway Company and the State of Washington. I had to make an appeal to the Commissioner in the Land Office, and finally to make an appeal to the Secretary of the Interior and as a result of this appeal the Secretary of the Interior modified the ruling of the Commissioner of the Land Office and allowed a re-opening of the case. Afterwards, to comply with the new ruling of the department I was required to have an amended survey and furnish other evidence. The final decision of the Department has not yet been reached, and the ownership depends upon the decision of the Department. The Department has rejected the application in regard to all portions of the claims in Section 36, 35 and 2.

Thereupon the defendants introduced in evidence the Statute of Limitations of the State of Washington, as found in Remington & Ballinger's Code, as follows:

"Sec. 159. Within three years. * * *

4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

"Sec. 165.

An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

"Sec. 464.

The superior court in which a judgment has been rendered * * * shall have power * * * to vacate or modify such judgment or order: * * *

4. For fraud practiced by the successful party in obtaining the judgment or order."

"Sec. 467.

The proceedings to obtain the benefit of subdivisions * * * 4 * * * of Sec. 464 shall be by petition verified by affidavit * * * and such proceedings must be commenced within one year after the judgment or order was made. * * *"

It was here stipulated between counsel for complainant and for defendants that if this action was decided in favor of the complainant that the Court might fix the value of the services of Lloyd L. Black for attending to the matters relating to obtaining a patent, it appearing to the Court that no payment had been made said Lloyd L. Black as patent attorney, and that the amount of said fee had not been agreed upon between said defendants and said Lloyd L. Black.

United States of America, Western District of Washington,
ss.

I hereby certify that the foregoing statement contains, in a simple and condensed form, a true, complete and properly prepared statement of the oral testimony upon

which the final decree and the decree denying Petition for Re-hearing herein was based; and that it together with the following Exhibits and parts thereof, to-wit:

The following portions of complainant's Exhibit "B," to-wit: pp. 1-15 inclusive; p. 18; pp. 20-27 inclusive; p. 40; pp. 45-48 inclusive; pp. 54-58 inclusive; p. 61; p. 75; pp. 93-99 inclusive; pp. 101-104 inclusive and p. 116;

Also Complainant's Exhibits "P" and "Q";

Also the following portion of Defendants' Exhibit 7, to-wit: First and second paragraphs thereof with the date and address, and the notation "Ans. 2/7/04" found at end of letter.

Also Defendants' Exhibits 9, 13, 17, 21 and 28; also that part of Defendants' Exhibit 15 which is letter from McNutt to Buchler dated October 3, 1907; constitutes all the evidence essential or necessary to a review and decision of said cause on appeal.

Dated this 22 day of December, A. D. 1914.

JEREMIAH NETERER,

Judge for the District Court of
United States for the Western
District of Washington, North-
ern Division.

Indorsed: Condensed Statement of Facts. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 22, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

[Excerpts from Plaintiff's Exhibit B]

*In the Superior Court of the State of Washington, in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No.

SUMMONS.

The State of Washington, To the said Sunset Copper Mining
Company, a corporation, Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid and answer the complaint of plaintiff and serve a copy of your answer upon the undersigned attorney for plaintiff, at his office below stated; and in case of your failure so to do, judgment will be rendered against you, according to the demand of the complaint which will be filed with the clerk of said Court, a copy of which is herewith served upon you.

JOHN SANDIDGE,

Attorney for Plaintiff.
Post Office Address, Everett,
Snohomish County, Wash.

Filed: Dec. 9, 1908

JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No.

COMPLAINT.

Comes now the plaintiff above named, and for cause of action herein alleges as follows, to-wit:

First: That the Sunset Copper Mining Company, defendant above named, is a corporation duly organized and existing under and by virtue of the laws of the State of Washington;

Second: That the said defendant has property situated near Index, in the County of Snohomish, State of Washington, consisting of certain mining claims, thirty-six in number, and also owns the North half (N½) of Section One (1), Township Twenty-seven (27), Range Ten (10), E. W. M., in said County, and a tramway leading from said mining claims to the Town of Index, and a bridge across the Skykomish River at Index, all of which tramway and bridge is known as the Sunset bridge and tramway;

Third: That heretofore the said defendant made, executed and delivered to Ellen C. Baldwin the following described notes, to-wit:

One note, dated November 3, 1903, payable in one year, for	\$5000.00
One note, dated November 13, 1903, payable in one year, for	1000.00
One note, dated November 20, 1903, payable on demand, for	1000.00
One note, dated November 27, 1903, payable on demand, for	3000.00
One note, dated February 8, 1904, payable on demand, for	5000.00
One note, dated February 8, 1904, payable on demand, for	5471.00
One note, dated August 3, 1904, payable on demand, for	4263.60
One note, dated September 17, 1904, payable on demand, for	4649.50

All bearing interest at the rate of six (6) per cent. per annum from date until paid, and that, to secure the payment of said notes two certain mortgages were executed by said defendant which are now of record in the office of the County Auditor of Snohomish County, Washington, one dated December 31, 1904, and one dated February 10, 1905, said mortgages conveying all real and chattel property of the defendant as security.

That afterwards and on July 10, 1907, the said Ellen C. Baldwin, for a good and valuable consideration, duly assigned and transferred said notes and mortgages to the said plaintiff, who is now the holder thereof; which notes are long past due and wholly unpaid; except the sum of \$501.00 paid thereon November 25, 1907;

Fourth: That, under the laws of the State of Washington, and of the United States, it is necessary for the said defendant, in order to hold its said mining claims, to do annually at least One hundred (\$100.00) dollars' worth

of work upon each of said claims, and it is necessary that there be expended upon said claims, during the year 1908 the sum of at least Thirty-six hundred (\$3600.00) dollars, and that said defendant has no money or resources with which to do said work upon said mining claims, and that said defendant is insolvent and is unable to pay its obligations hereinbefore mentioned and other indebtedness owing by said company;

Fifth: That the total indebtedness of said company aggregates more than Forty-five thousand (\$45,000.00) dollars, and that it has no means of paying said indebtedness; that the property hereinbefore described is unproductive and the company is unable to proceed with the development of said property, and that, if said work is not done upon said claims, that the said company will forfeit all right to said mining claims;

Sixth: That the said property of the said company is valuable and of such a nature as to justify the expenditure of the sum of Thirty-six hundred (\$3600.00) dollars and more upon said property in its development and in doing the work necessary to be done in order to hold said claims. That property covered by said mortgages and owned by said company is more particularly described as follows, to-wit: Certain quartz mining claims, situate and being in the Index Mining District, in Snohomish County, State of Washington, commonly known as the Sunset group of mining claims, particularly described and known as follows:

Mountain Side No. 4, Ivy R. Mable, Lloyd B., Hazel C., Mountain Side No. 3, Sunset, Sunset Extension, Fourth of July Extension, Star, Star No. 2, W. H. B., Brown Bear, Boundary, Black Bear, Black Bear Extension, Copper King, Copper King Extension, Fourth of July, Miss Helen, Mountain Side, Mountain Side No. 2, Mono, Mono No. 2, River Side, Ravine, Ravine Extension, Success, Lebanon Extension, Lebanon, Glens Falls Extension, Glens Falls, Crown Point No. 3, Crown Point No. 2, Crown Point, Lost Art;

All of said mining claims being duly recorded in the mining Records of the office of the County Auditor of said Snohomish County, Washington;

Said defendant is also the owner of a saw mill erected upon said property, together with water power, flumes connected with said water power, compressor plant, electric light plant, drills, tools, supplies and other mill and mining appliances now situated on said property, together with water rights and other rights appurtenant thereto.

Wherefore, the plaintiff prays that a receiver be appointed for said property and that said receiver be authorized and directed to raise funds, borrow money, and to issue receiver's certificates therefor or otherwise to provide for the raising of money for the doing of the necessary work in order to hold said mining claims and to watch and care for said property, and that the receiver be authorized and directed to sell the whole or such portion of said property as may be necessary in order to pay the indebtedness of said company, and to do any and all other acts necessary or proper to be done in the premises in order to protect the interest of the creditors of said defendant and the stockholders in said company and for the payment of all debts and obligations of said company or of the receivership, and that plaintiff have such other and further relief as to the Court may seem just and proper in the premises, and for judgment against said company foreclosing said mortgages as provided by law and that the plaintiff be allowed to purchase the property covered by said mortgages.

JOHN SANDIDGE,

Attorney for Plaintiff.

State of New York, County of Warren, ss.

Frank L. Bell, being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint, knows the contents thereof and verily believes the same to be true.

FRANK L. BELL.

Subscribed in my presence and sworn to before me this 30th day of November, 1908.

Notary Public Seal.

J. EDWARD SINGLETON,

Notary Public.

The above named defendant by H. C. McNutt, its president, does hereby acknowledge due and timely service of the foregoing summons and complaint.

Dated November 30, 1908.

H. C. McNUTT,

President of Sunset Copper
Mining Company, a corpora-
tion.

Filed Dec. 9, 1908;

JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

AFFIDAVIT.

State of New York, County of Warren, ss.

F. D. Morehouse being duly sworn says he is upwards of twenty-one years of age and resides at Glens Falls, in said Warren County; That on November 30th, 1908, between the hours of two and six o'clock in the afternoon of said day, he personally served the annexed summons and complaint, affidavit and notice upon the defendant the Sunset Copper Mining Company, by delivering to and leaving true copies of each of the same with Henry C. McNutt, at Glens Falls, in said Warren County.

That deponent personally knows the said Henry C. McNutt to be the president of the above named defendant and the corporation named in and to which said Summons and complaint, affidavit and notice is directed.

Deponent further says that he has no interest in nor against the above named defendant, and at the time when he served the above mentioned papers upon said defendant he was and still is competent to be a witness, either for or against said defendant.

F. D. MOREHOUSE.

Subscribed and sworn to before me this 30th day of November, 1908,

Notary Public Seal.

J. EDWARD SINGLETON,

Notary Public.

Filed: Dec. 9, 1908. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No.

NOTICE.

To the Sunset Copper Mining Company:

You are hereby notified that the above named plaintiff will, on the 9th day of December, A. D. 1908, at 9:30 o'clock, A. M., of said day, or as soon thereafter as counsel can be heard, apply to the Superior Court above named to have a Receiver appointed for the property of said defendant, for the reason that said defendant is insolvent and unable to pay its obligations and indebtedness and is unable to do the work necessary to be done upon its mining claims in Snohomish County, Washington, in order to hold and protect the same.

Notice is hereby given that at said time and place application will be made to have the Receiver authorized and directed to do said work upon said claims, costing approximately Thirty-six hundred (\$3600.00) dollars and that said Receiver be authorized and directed to issue Receiver's certificates evidencing said indebtedness together with interest on the same, and that said Receiver be authorized to borrow money on such terms for such purpose as the Court may direct, and application will be made at said time and place for an order authorizing the said Receiver to proceed with such development work.

JOHN SANDIDGE,

Attorney for Plaintiff.

The above named defendant, by H. C. McNutt, its President, does hereby acknowledge due and timely service of the above Notice.

Dated this 30th day of December, A. D. 1908.

H. C. McNUTT,
President of Sunset Copper
Mining Company, a corpora-
tion.

Filed Dec. 9th 1908. John R. Dally, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No.

AFFIDAVIT.

State of New York, County of Warren, ss.

Frank L. Bell, being first duly sworn, deposes and says
as follows:

That he is the plaintiff in the above entitled action, and is the owner and holder of two certain mortgages, of date December 31, 1904, and February 10, 1905, made, executed and delivered by the Sunset Copper Mining Company, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, to one Ellen C. Baldwin and by her duly assigned and transferred to him for a good and valuable consideration, said mortgages being given to secure the payment of the following described notes, each of said notes bearing interest at the rate of six per cent. per annum from date until paid, to-wit:

One note, dated November 3, 1903, payable in one
year, for\$5,000.00

One note, dated November 13, 1903, payable in one
year for 1,000.00

One note, dated November 20, 1903, payable on de-
mand, for 1,000.00

One note, dated November 27, 1903, payable on de-
mand, for 3,000.00

One note, dated February 8, 1904, payable on demand, for	5,000.00
One note, dated February 8, 1904, payable on demand, for	5,471.00
One note, dated August 3, 1904, payable on demand, for	4,263.60
One note, dated September 17, 1904, payable on demand, for	4,649.50

That each and all of said notes are long past due and wholly unpaid; except the sum of \$501.00 paid thereon November 25, 1907.

That said defendant above named owes other debts and obligations long past due, and the total indebtedness of said corporation at this time aggregates more than Forty-five thousand (\$45,000.00); that said corporation is without means to procure the doing of work necessary to hold its mining claims under the laws of the State of Washington and of the United States, and will be forced to incur further indebtedness in order to procure the doing of such work; that the said corporation is at this time insolvent and unable to meet its obligations.

FRANK L. BELL.

Subscribed in my presence and sworn to before me this 30th day of November, A. D. 1908.

Notary Public Seal.

J. EDWARD SINGLETON,
Notary Public.

The above named defendant by H. C. McNutt, its President, does hereby acknowledge due and timely service of the foregoing affidavit.

Dated November 30, 1908.

H. C. McNUTT,
President of Sunset Copper
Mining Company, a corporation.

Filed: Dec. 9, 1908. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

ORDER APPOINTING RECEIVER.

This day this cause came on regularly for hearing upon the application of Frank L. Bell, plaintiff herein, for the appointment of a receiver for the defendant, Sunset Copper Mining Company, a corporation. And it appearing from the files and records herein that due and legal notice of this application, together with a true copy of the summons and complaint herein and of the affidavit used upon this hearing, have been duly served upon the defendant, the Sunset Copper Mining Company, and that no answer, demurrer or objections to this application have been filed or made;

And it further appearing to the satisfaction of the Court, from the evidence offered and heard upon this application, that the defendant, Sunset Copper Mining Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Washington; that on the 31st day of December, 1904, and on February 10, 1905, said defendant corporation duly executed and delivered to one Ellen C. Baldwin two certain mortgages and that said mortgages were by her duly assigned and transferred to the Plaintiff herein, together with the notes thereby secured; that said mortgages were given to secure the payment of eight promissory notes, aggregating the principal sum of \$29,384.10, and that no part of said notes has ever been paid except the sum of \$501.00; that all of said notes are now long past due and that said corporation is, in addition thereto, largely indebted to various other persons; that the property covered by said mortgages, and of which the defendant corporation is the owner, consists of certain quartz mining claims, situate

in the Index Mining District, in Snohomish County, Washington, commonly known as the Sunset group of mining claims, and described and known by the following names, to-wit, Mountain side No. 4, Ivy R., Mable, Lloyd B., Mountain side No. 3, Sunset, Sunset Extension, Fourth of July Extension, Star, Star No. 2, W. H. B., Brown Bear, Boundary, Black Bear, Black Bear Extension, Copper King, Copper King Extension, Fourth of July, Miss Helen, Mountain side, Mountain side No. 2, Mono, Mono No. 2, River side, Ravine, Ravine Extension, Success, Lebanon, Lebanon Extension, Glens Falls, Glens Falls Extension, Crown Point No. 3, Crow Point No. 2, Crown Point, Lost Art; that none of the assessment work for the year 1908 has been done upon said claims or any of them; that unless assessment work to the amount of \$3600.00 shall be done upon said claims for the year 1908 defendants title thereto will be lost; that the defendant, Sunset Mining Company, a corporation, has no funds with which to perform said assessment work; that unless a receiver is appointed herein, with power to cause said assessment work to be done and to borrow funds for said purpose, said claims will be lost and plaintiff will be deprived of the security for the payment of his aforesaid notes; that John B. Fogarty is a fit and proper person to act as receiver for said defendant corporation;

Now therefore, it is hereby ordered, adjudged and decreed, that John B. Fogarty be, and he is hereby appointed Receiver of the defendant, Sunset Copper Mining Company, and it is further ordered that said receiver cause all necessary assessment work to be done upon the aforesaid mining claims and to take possession said mining claims and all other property of said defendant mining company and do all things necessary to preserve and protect said property from loss, and for said purpose he is hereby authorized to borrow such sums of money as may be necessary and issue therefor Receiver's certificates bearing interest at the rate of 6% per annum, which said certificates shall be a first lien upon all the property and assets of the defendant, Sunset Mining Company, a corporation.

It is further ordered that said Receiver shall before entering upon his duties as such take and subscribe the

oath required by law, and enter into bonds to the defendant its stockholders and creditors, in the sum of \$1,000.00 with good and approved security, conditioned that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court herein.

Done in open Court this 10th day of December, 1908.

A. W. FRATER,

Presiding Judge.

Filed: Dec. 10, 1908. JOHN R. DALLY, County Clerk.

Know all men by these presents:

That we, John B. Fogarty, and American Bonding Company of Baltimore, a body corporate, duly incorporated under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington as surety, are held and firmly bound unto Sunset Copper Mining Company, its stockholders and creditors a their interest may appear in the full and just sum of One thousand (\$1000.00) dollars, current money, to be paid to above parties or certain attorney; to which payment well and truly to be made and done, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 10th day of December, in the year of our Lord One thousand nine hundred eight.

Whereas, by an order of the Honorable the Judge of the Superior Court for Snohomish Co., Washington, bearing date on the 10th day of December, 1908, and passed in a cause in the said Court, wherein Frank L. Bell, Complainant, and Sunset Copper Mining Company, Defendant, the above bounden John E. Forgarty, has been appointed Receiver.

Now the condition of the above obligation is such, that if the above bounden John B. Fogarty, does and shall, well and faithfully perform the trust reposed in him by said order or that may be reposed in him by any other order or decree in the premises, and obey the orders of the Court therein then the above obligation to be void, otherwise to remain in full force and virtue in law.

Witness, the hand and seal of the said John B. Fogarty and corporate name of the said American Bonding Company of Baltimore subscribed by its Vice-President, and the corporate seal of the said American Bonding Company of Baltimore, attested by the signature of its Assistant Secretary.

JOHN B. FOGARTY. (SEAL)

Signed, sealed and delivered in
the presence of S. J. Brooks.

(SEAL)

AMERICAN BONDING COM-
PANY OF BALTIMORE,

By JOS. COLEMAN,
Vice-President.

Attest: FRED P. BUELL,
Assistant Secretary.

The above Bond is hereby approved this Dec. 10, 1908.

A. W. FRATER, Judge.

Filed: Dec. 10, 1908. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

OATH OF RECEIVER.

I, John B. Fogarty, the duly appointed Receiver of the Sunset Copper Mining Company, do swear that I will faithfully perform the duties of said trust to the best of my ability.

JOHN B. FOGARTY.

Subscribed and sworn to before me this 11th day of December, 1908.

JOHN SANDIDGE,

Court Commissioner for Sno-
homish County, Washington.

Filed: Dec. 11, 1908. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No.

APPEARANCE AND STIPULATION.

I, D. W. Locke, do hereby enter my appearance as attorney for the above named defendant, having been duly authorized to appear as such attorney, and hereby consent that the above case may be tried on January 30, 1909, at 10 o'clock A. M. of said day, or as soon thereafter as same may be reached.

D. W. LOCKE,
Attorney for Defendant.

It is hereby stipulated by and between the said plaintiff and the said defendant that the above entitled action may be tried before F. E. Anderson as Judge pro tem, and that said case may be tried before F. E. Anderson as Judge pro tem on the 30th day of January, 1909, at the county court house in Everett, Washington, at ten o'clock A. M. of said day or as soon thereafter as same can be reached.

JOHN SANDIDGE,
Attorney for Plaintiff.

D. W. LOCKE,
Attorney for Defendant.

The foregoing stipulation that F. E. Anderson shall try the above cause as Judge pro tem, is hereby approved.

W. W. BLACK, Judge.
Filed: Jan. 30, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE.

This day this cause came on regularly for trial before the Hon. F. E. Anderson, judge pro tempore, the plaintiff and defendant by their attorneys of record, having stipulated in writing for the trial hereof at this time before said judge pro tempore, and said stipulation having been approved by the judge of the Superior Court and filed herein, the plaintiff appearing by his attorney, John Sandidge, Esq., and the defendant appearing by its attorney, D. W. Locke, Esq., and John B. Fogarty, Temporary Receiver herein, being present in person; and the court having heard all the evidence adduced or offered upon the trial and being in all things fully advised in the premises, makes the following findings of fact and conclusions of law, and decree herein, to-wit:

Findings of Fact.

The Court finds that all the allegations contained in plaintiffs complaint are true.

Conclusions of Law.

That the plaintiff is entitled to all the relief prayed for in his complaint.

Decree.

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff, Frank L. Bell, recover of the defendant, Sunset Copper Mining Company, the sum of Thirty-seven thousand five hundred and one & 75/100 (\$37,501.75) dollars, together with interest thereon at the rate of 6% per annum from this day until paid, and his costs herein expended and all disbursements by him made, including an attorneys fee in the sum of \$..... That the plaintiff have a lien, by reason of the mortgages sued upon in his complaint upon the following described property to secure the payment of his said judgment, interest and costs, to-wit, upon those certain quartz mining claims, situate in the Index Mining District in Snohomish County, Washington, and known as: Mountain Side No. 4; Ivy R., Mable; Lloyd B.; Hazel C.; Mountain Side No. 3; Sunset; Sunset Extension; Fourth of July Extension; Star; Star No. 2; W. H. B.; Brown Bear; Boundary; Black Bear; Black Bear Extension; Copper King; Copper King Extension; Miss Helen; Mountain Side; Mountain Side No. 2, Mono; Mono No. 2; River Side; Ravine, Ravine Extension; Success; Labanon; Labanon Extension; Glens Falls; Glens Falls Extension; Crown Point; Crown Point No. 2; Crown Point No. 3; Lost Art, being thirty-six claims. Also that certain Saw Mill erected upon said premises together with water power, flumes connected with said water power, compressor plant, electric light plant, drills, tools, supplies and all other mill and mining machinery and appliances now situated upon said mining claims and premises, with all water rights and other rights and appurtenances thereto. Also all the interest of the defendant in and to the North Half of Section 1, Township 27, N. Range 10 East W. M.; that said lien be and the same is hereby foreclosed and said property sold as hereinafter directed to satisfy plaintiffs said judgment, interest, costs and disbursements.

It is further ordered, adjudged and decreed, that the defendant, Sunset Copper Mining Company, a corporation, is insolvent and that it is necessary that a permanent receiver be appointed for said defendant corporation to preserve its property that John B. Fogarty be and he is hereby appointed receiver of said defendant corporation upon taking the oath required by law and executing bonds,

with good and approved security in the sum of \$1000.00; that said receiver be and he is hereby invested with all the powers and duties heretofore given the temporary receiver herein by the orders of this Court and such further powers as the court may hereafter order.

It is further ordered, adjudged and decreed, that the bond heretofore given herein by the said John B. Fogarty, as temporary receiver may be continued and remain in force as his bond, above required as permanent receiver.

It is further ordered, adjudged and decreed, that plaintiff is entitled to have all of the above described property and all the rights and appurtenances thereunto belonging and all other property belonging to said defendant, Sunset Copper Mining Company, a corporation, or a sufficiency thereof to pay his said judgment, interest and costs, sold to satisfy same.

Done in open Court this 30th day of January, 1909.

F. E. ANDERSON,
Judge Pro Tempore.

Filed: Jan. 30, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No.

OATH OF RECEIVER.

State of Washington, County of Snohomish, ss.

I, John B. Fogarty, do solemnly swear that I will support the constitution of the United States and the constitution and laws of the state of Washington, and that I will perform my duties as receiver of Sunset Copper Mining Co., a corporation, to the best of my ability, so help me God.

JOHN B. FOGARTY.

Subscribed and sworn to before me this 1st day of February, 1909.

F. E. ANDERSON,

Notary Public in and for the
State of Washington, residing
at Everett.

Filed: Feb. 2, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

State of Washington, County of Snohomish, ss.

I, G. A. Church, being first duly sworn on oath depose and say: That I am the head clerk of the Everett Weekly Herald, a weekly newspaper printed and published in the City of Everett, County of Snohomish, and State of Washington; that said newspaper is a newspaper of general circulation in said county and state, and that the notice to creditors of Sunset Copper Mining Company in Bell vs. Sunset Copper Mining Co., No. a printed copy of which is hereunto attached, was published in said newspaper and not in supplement form, in the regular and entire edition of said paper once each week for a period of four consecutive weeks, beginning on the 26th day of December, 1908, and ending on the 16th day of January, 1909, both dates inclusive and that said newspaper was regularly distributed to its subscribers during all of said period.

G. A. CHURCH.

Subscribed and sworn to before me this 2d day of February, 1909.

J. B. BEST,

Notary Public in and for the
State of Washington, residing
at Everett, Snohomish County.

(SEAL)

Publisher's Fees \$.....

“Notice to Creditors of Sunset Copper Mining Company, a corporation.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

You, and each of you are hereby notified to present to John B. Fogarty, receiver of the defendant corporation, whose postoffice address is Walsh Block, Everett, Snohomish County, Washington, or to the clerk of the Superior Court of the State of Washington, in and for the county of Snohomish, a verified statement of any claim or claims which you may have against said defendant, Sunset Copper Mining Company, a corporation, on or before the first day of February, 1909, and in case of your failure so to do, any claim which you may have will be deemed barred and not entitled to any participation in the proceeds of the receivership of said defendant corporation.

You and each of you are further notified that the said receiver is required to report and file with the clerk of said court all claims against said defendant Sunset Copper Mining Company, a corporation, filed with the receiver, on or before the 3d day of February, 1909, and any person desiring to object to any of the claims so filed are required to file their objections in writing with the clerk of said court on or before the 10th day of February, 1909, which said date has been fixed as the time for hearing of such objections, this December 10, 1908.

JOHN B. FOGARTY, Receiver.

Date of first publication, Dec. 26, 1908."

Filed: Feb. 3, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

REPORT.

The undersigned, the duly appointed, qualified and acting receiver of Sunset Copper Mining Co., a corporation, the above named defendant, pursuant to an order of this court made and entered herein on the 10th day of December, 1908, respectfully shows that before the 1st day of February, 1909, the following claims against said defendant have been filed with the receiver or with the clerk of the court in the above entitled action, to-wit:

I.

Claim of W. W. Black on account of salary, judgment and money advanced to said defendant amounting in all to the sum of ten thousand nine hundred twenty-three and 21/100 dollars (\$10,923.21), as appears in detail from the claim of said W. W. Black, hereto attached.

II.

Claim of Henry C. McNutt on account of office rent, rent on typewriter, furniture, stamps, etc., advertising, salary, etc., amounting to thirteen hundred seven and 95/100 dollars (\$1307.95), as appears in detail upon the claim of Henry C. McNutt, hereto attached.

III.

Claim of Frank L. Bell, same being as exemplified copy of certain court records in the circuit court of the United States for the Northern District of New York, showing a judgment in favor of the said Frank L. Bell, for the amount of twelve thousand seven hundred sixty-seven and 57/100 dollars (\$12,767.57), and that the exemplified copy of said judgment is hereto attached and hereby referred to and made a part of this report.

IV.

Judgment in favor of Frank L. Bell against said defendant in the sum of thirty-seven thousand five hundred one and 75/100 dollars (\$37,501.75), with interest at six per cent. (6%) per annum from the 30th day of January, 1909, together with the costs and disbursements of said action, and that said judgment was rendered in the above entitled court and is now on file in the office of the clerk of said court.

V.

Bill of H. L. Bartlett of Index, Washington, amounting to twelve and 80/100 dollars (\$12.80) on account of merchandise sold said defendant in the month of December, 1908.

VI.

Said receiver further shows that on the 2d day of February, 1909, H. W. Holmes filed his verified claim with the said Receiver, claiming that the said defendant is indebted to the said H. W. Holmes in the sum of fourteen hundred eighty-eight and 69/100 dollars (\$1488.69), and that said claim is hereto attached hereby referred to and made a part of this report.

Respectfully submitted,

JOHN B. FOGARTY, Receiver.

State of Washington, County of Snohomish, ss.

John B. Fogarty being first duly sworn on oath deposes and says that he is the Receiver named in the foregoing report; that he has read the same, knows the contents thereof and that the same is true and correct.

JOHN B. FOGARTY.

Subscribed and sworn to before me this 2d day of February, 1909.

G. W. ADAMSON,

Notary Public in and for the
State of Washington, residing
at Everett.

Filed: Feb. 3 ,1909. JOHN R. DALLY, County, Clerk.

State of Washington, County of Snohomish, ss.

W. W. Black, of lawful age, being first duly sworn, deposes and says that the Sunset Copper Mining Company is indebted to him in the following sums, to wit:

On account of salary as General Manager from

July 20th, 1903, to October 1st, 1906, at the rate of \$100.00 per month	\$ 3,833.33
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On account of salary as General Manager from September 1st, 1907, to November 15th, 1908, at rate of \$100.00 per month	1,350.00
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On account of Judgment in the case of W. W. Black vs. Sunset Copper Mining Company No. 8500, records of Snohomish County, dated June 26, 1907,	\$1,324.22	
and interest on same	125.83	1,450.05

On account of money advanced December 26, 1906, secured by note and mortgage on all the property of said company, which mortgage is recorded in the Auditor's office, Snohomish County, Washington, in Volume 62 of Mortgages, page 357 et seq., \$1,500.00 and interest on same at six per cent.	187.50	1,687.50
On account of money advanced to said Company during the year 1908, in payment of work, labor, supplies and expenses of said Company in connection with the doing of assessment work on the property of said Company		2,602.33
making a total of		\$10,923.21

Affiant deposes and says that all of said sums are justly due, owing and unpaid after deducting all just credits and offsets, and that said Company is now indebted to him in the full sum of \$10,923.21.

W. W. BLACK.

Subscribed in my presence and sworn to before me this 29th day of January, A. D. 1909.

O. C. GASTON,

Notary Public in and for the
State of Washington, residing
at Everett, Snohomish County,
said State.

(SEAL)

Jan. 30th.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

REPORT AND PETITION.

To the Honorable, the above entitled court:

The undersigned petitioner respectfully shows:

I.

That he is the duly appointed, qualified and acting receiver of Sunset Copper Mining Co., a corporation.

II.

That on the 10th day of February, 1909, one Nicholas Rudebeck, claiming to be a stockholder in said Sunset Copper Mining Co., made written demand upon said receiver on behalf of himself and all other stockholders similarly situated, that the undersigned as receiver of said Sunset Copper Mining Co., forthwith commence an action against Mrs. Ellen C. Baldwin to collect the balance due on the stock which she holds in said Sunset Copper Mining Co., which was issued to W. H. Baldwin and assigned by W. H. Baldwin to Ellen C. Baldwin as cestui que trust without any consideration prior to the death of said W. H. Baldwin. Said demand also states that there is a balance due of ninety-seven and one-half cents (97½c) per share upon two hundred fifty thousand (250,000) shares of stock in said company from the said Ellen C. Baldwin, and that a copy of said demand is hereto attached, marked Exhibit "A," hereby referred to and expressly made a part of this report and petition.

III.

That said receiver has no knowledge whatever regarding the liability of the said Ellen C. Baldwin as set forth in said demand, and that said receiver does not know and has no means of ascertaining whether a judgment obtained against said Ellen C. Baldwin could be collected.

IV.

That no money whatever has come into the possession of said petitioner as such receiver and that said receiver has no funds to defray the expense of any litigation, and that said receiver is informed and believes, and therefore alleges the fact to be, that the said Ellen C. Baldwin is a non-resident of the State of Washington and is a resident of the State of New York.

V.

Said receiver is ready and anxious to take any steps the Court may deem necessary to protect the rights of all creditors and stockholders of said Sunset Copper Mining Co.

VI.

That in order that the court and said receiver may be fully advised in the premises said receiver alleges that it is necessary for the court to make an order requiring said Nicholas Rudebeck to appear before the said court at a time and place to be by the said court designated, then and there to disclose any and all facts tending to show any liability on the part of the said Ellen C. Baldwin to said Company or to any other person that the court may direct said receiver to take what steps may be necessary to protect the interest of all persons concerned.

Wherefore said petitioner prays that the court will make an order directing said Nicholas Rudebeck to appear

before the court on a day certain, then and there to give what information may be in his possession regarding the liability of the said Ellen C. Baldwin, or any other person to said company upon the hearing.

JOHN B. FOGARTY, Receiver.

State of Washington, County of Snohomish, ss.

John B. Fogarty being first duly sworn on oath deposes and says: That he is the receiver named in the above and foregoing report and petition; that he has read the same, knows the contents thereof and believes the same to be true.

JOHN B. FOGARTY.

Subscribed and sworn to before me this 15th day of February, 1909.

JOS. COLEMAN,

Notary Public in and for the
State of Washington, residing
at Everett.

Exhibit "A."

Everett, Washington,

Feb. 10, 1909.

To John B. Fogarty, Esq.,

As receiver of the Sunset Copper Mining Company, a
corporation.

Dear Sir:

I, Nicholas Rudebeck, as a stockholder of said Sunset Copper Mining Company, and in behalf of myself and all other stockholders similarly situated, demand that you as such receiver forthwith commence an action against Mrs. Ellen C. Baldwin to collect the balance due on the stock

which she holds in said Sunset Copper Mining Company, which was issued to W. H. Baldwin, and assigned by W. H. Baldwin to Ellen C. Baldwin, as his wife and sectu que tus (cestui que trust), without any consideration, prior to the death of said W. H. Baldwin, said stock being issued to said W. H. Baldwin on or about the day of June, 1903, and upon which there is a balance due the company of 97½ cents per share. The number of shares as aforesaid and upon which there is remaining unpaid the Company 97½ cents per share is 250,000 shares of the par value of \$1.00 each.

I hereby demand that you as receiver of said company commence an action against said Ellen C. Baldwin on her stock as aforesaid to recover the amount of \$62,000.00, or sufficient to pay all the indebtedness now outstanding against the property of said mining company and against said mining company.

Very truly yours,

NICHOLAS RUDEBECK.

Filed: Feb. 15, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

ORDER OF SALE.

This day this cause come on for hearing upon the petition of John B. Fogarty, receiver of the defendant Sunset Copper Mining Company, for an order directing and permitting said receiver to sell the property of said defendant, for the purpose of paying the claims against said defendant. And it appearing to the satisfaction of the court, from the records and files herein and the proofs offered and heard at this time, that the claims heretofore adjudged valid and subsisting demands against said defendant aggregate the sum of \$64,001.97; that the receiver certificates outstanding and the costs and probable costs of the receivership aggregate the further sum of \$3,200.00; that the defendant has no funds whatever with which to pay said claims or any means by which it can raise the money to do so; that the only property of the defendant consists of quartz mining claims, mining machinery, saw-mill and appurtenances, etc., all of which is more fully described hereinafter; that said mining claims have not as yet been developed to a point where they can be operated as a mine; that it will be unprofitable to operate said mining claims without the investment of a large sum for development purposes; that defendant has no funds with which to develop said claims nor any money with which to do the necessary assessment work in order to hold its right and title to said claims and that same will be lost to the defendant unless they are sold; that the personal property of defendant and other property hereinafter described is chiefly valuable to be used in connection with said mining claims and that it is to the best interest of the defendants, its stockholders and creditors that all of said property be sold in one parcel, and it

appearing that it is necessary to sell all of said property for the purpose of paying the liabilities of the said defendant, Sunset Copper Mining Company;

Now, therefore, it is ordered, adjudged and decreed, that John B. Fogarty, receiver of the defendant, proceed to sell, at public auction to the highest and best bidder, for cash 20% of the price offered to accompany the bid the balance to be paid upon confirmation, all of the property of the said defendant, particularly described as follows: Thirty-six quartz mining claims situate in the Index mining District, in Snohomish County, Washington, and known as the Mountain Side, Mountain Side No. 2., Mountain Side No. 3, Mountain Side No. 4., Ivy R., Mable., Lloyd B., Sunset., Sunset Extension., Fourth of July., Fourth of July Extension., Star., Star No. 2., W. H. B., Brown Bear, Boundary, Black Bear, Black Bear Extension, Copper King, Copper King Extension, Miss Helen, Mono, Mono No. 2, River Side, Ravine, Ravine Extension, Success, Lebanon, Lebanon Extension, Glens Falls, Glens Falls Extension, Crown Point, Crown Point No. 2, Crown Point No. 3, and Lost Art. Also the north half of Section One (1) Township Twenty-seven (27) North, Range Ten (10) East W. M. Also a tramway leading from said mining claims to the town of Index and a bridge across the Skykomish river, said tramway and bridge being known as the Sunset bridge and tramway; also a saw mill erected upon said mining claims; also the compressor plant, water power, flumes, electric light plant, drills, tools, supplies, water and riparian rights, and all other mining machinery, appliances and appurtenances situate upon and about the said mining claims and property to which said defendant has title, and all the right, title and interest of the said defendant in and to said property, and all other property of defendant situated in Snohomish County, Wash.

Said sale will be held at the west front door of the Snohomish County Court House, in the City of Everett, and before making same the receiver will cause a notice thereof to be published in the Everett Daily Herald once a week for four consecutive weeks before said sale, and posting a notice thereof in three of the most public places in Snohomish County, Wash., four weeks before said sale.

Said notice will give the time, terms and place of sale, and will contain a description of the property to be sold as hereinabove described.

It is further ordered, adjudged and decreed, that said receiver shall accept from the purchaser at said sale, at their face value, as part payment upon the purchase price of said property, any receivers receipts issued by the receiver herein and held by the purchasers also any claims which have been adjudicated as valid claims against said defendant and which may be legally held or duly assigned to the purchaser; provided however that the receiver shall first require from the purchaser a payment of \$2,000.00 in cash; and provided further that no claim shall be received until the purchaser has paid in cash a sum sufficient to equal the amount of outstanding receivers receipts and the amount of any claims which have been adjudged to be preferred and prior to the claim so presented.

Said receiver will report his acts hereunder to this court.

Done in open court this 15th day of Feb. 1909.

LESTER STILL,

Presiding Judge.

Filed: Feb. 15, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

ORDER FIXING PRIORITIES OF CLAIMS.

This day this cause coming on regularly for hearing upon the application of John B. Fogarty, receiver of the defendant, Sunset Copper Mining Company, for an order fixing and adjudging the priorities of the claims against said defendant; and it appearing that all the claimants against said defendant or their attorneys, have been duly served with a copy of the order fixing the time for hearing this application, and the court having heard said motion and being in all things fully advised;

Now, therefore, it is hereby ordered, adjudged and decreed, that all the claims heretofore filed with the said receiver, and reported and filed herein, are just claims against said defendant, Sunset Copper Mining Company, and are entitled to the following order, to-wit:

First: The costs and disbursements of the receivership and the Receivers Certificates issued by the receiver under the orders of the court.

Second: That portion of the claim of W. W. Black on account of moneys advanced during the year 1908, being for the sum of Two thousand six hundred and two (\$2,602.-33) dollars and thirty-three cents.

Third: That portion of the claim of W. W. Black on account of note and mortgage for money advanced Dec. 26, 1906, for the sum of \$1,687.50.

Fourth: The judgment of the plaintiff Frank L. Bell, rendered herein for the sum of \$37,501.75 and that portion of the claim of W. W. Black on account of judgment in the cause of W. W. Black vs. Sunset Copper Mining Company, cause No. 8500 of the docket of this court, for the sum of \$1,450.05.

Fifth: All the rest and residue of the claims filed with the Receiver shall be equal and entitled to participate in the distribution of the assets of the defendant upon an equal footing.

Done in open Court this 15th day of Feb., 1909.

LESTER STILL,

Presiding Judge.

Filed Feb. 15, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

ORDER.

This matter coming on regularly to be heard in open Court on the 19th day of February, 1909, upon the report, and petition of the receiver of the above named defendant for an order of the Court directing said receiver to take such action as the court might deem just and proper regarding the demand of Nicholas Rudebeck that said receiver institute an action against Ellen C. Baldwin for the purpose of recovering certain moneys alleged by the said Nicholas Rudebeck to be due and owing by the said Ellen C. Baldwin to the said defendant, and at the hearing upon said application the plaintiff in the above entitled action appearing by his attorney, John Sandidge, and the defendant appearing by its attorneys, Locke & Woodward, and the said Nicholas Rudebeck appearing in person and by his attorneys, Hathaway & Alston, and the receiver appearing in person, and after hearing all the testimony and after duly considering the same, together with the suggestions of the attorneys for the respective parties, it appearing to the Court that the proper order to make at this time is to direct said receiver to investigate said alleged claim and after so doing to report to the Court the result of said investigation.

It is therefore ordered, adjudged and decreed that said receiver be and he hereby is directed as soon as possible to investigate said claim and report the result of such investigation to the court.

Done in open Court this 20th day of February, 1909.

LESTER STILL, Judge.

Filed: Feb. 20, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

REPORT.

The undersigned receiver of Sunset Copper Mining Co., a corporation, respectfully shows to the court:

I.

That acting under the instructions of the court said receiver has investigated the demand by Nicholas Rudebeck that said receiver institute an action against Mrs. Ellen C. Baldwin.

II.

That said receiver has investigated the alleged claim of the Sunset Copper Mining Co. and the stockholders thereof against the said Ellen C. Baldwin and that from all the facts said receiver has been able to ascertain neither the Sunset Copper Mining Co. nor any stockholder or stockholders thereof have any cause of action against the said Ellen C. Baldwin.

Respectfully submitted,

JOHN B. FOGARTY, Receiver.

State of Washington, County of Snohomish, ss.

John B. Fogarty being first duly sworn on oath deposes and says: That he is the receiver named in the foregoing report; that he has read the same, knows the contents thereof and that the same is true and correct.

JOHN B. FOGARTY.

Subscribed and sworn to before me this 16th day of March, 1909.

JOS. COLEMAN,

Notary Public in and for the
State of Washington, residing
at Everett.

Filed: Mar. 17, 1909. JOHN R. DALLY, County Clerk.

FRANK L. BELL.

Attorney and Counselor at Law,

Glens Falls, N. Y.

November 16th, 1908.

To the Stockholders of Sunset Copper Mining Company, of
Everett, Washington.

Gentlemen:

The assessment work necessary to hold the claims of this company has not been done for the present year. This work required the expenditure of \$3,600, upon which I have advanced \$800.

The Company holds thirty-six claims and there is valuable standing timber upon them. Reports of expert place the value of this timber at \$40,000. I have been upon the property and know it is well timbered, but feel the above figures are too high. Personally I believe this timber to be worth fully \$25,000.

To hold this timber it is necessary to obtain patents from the government on these claims. Judge Black advises me it will cost about \$10,000 to secure these patents and at that the assessment work for this year must be done. This means raising \$13,600.

W. H. Baldwin died in April, 1905, and left his widow without any property, except her home in this city and her interest in the Sunset property. Mr. Baldwin's executor advises me the estate will not pay the debts. In other words Mr. Baldwin died insolvent.

Mrs. Baldwin requested me to assist her with this property and July 11, 1907, assigned to me \$1,250,328 shares of stock in the company, and debts which, with interest, now amount to about \$40,000; fully \$35,000 of which is secured by mortgage on the company's property. The company owes me about \$12,000 additional; it owes Judge Black about \$5,000 and the W. H. Baldwin estate a claim of about \$8,000, which I believe should be reduced to say \$5,000. This makes the present indebtedness about \$62,000, and there is some money due the officers for services.

The total stock issued by the company is about 2,300,000 shares, which shows my holdings to be a little over one-half of the total issue.

Judge Black and myself are willing to let our claims rest, and join other stockholders in trying to do something with the property. We feel justified in saying we can arrange to have all claims against the company held. Times and conditions have been such during the past year and one-half that it has been impossible to do anything with a copper property. Nevertheless Judge Black and myself have tried hard to do something with this property.

As I am in no way responsible for the the condition of the company I do not feel called upon to make further advances to it. If the other stockholders are willing to do their part, I am ready to do mine, based upon my stock holdings. I believe it unbusinesslike not to patent the claims and hold the timber; if anything is warranted it is the holding of this timber and unless this can be done I do not care to go on, but prefer to let the company go where it will.

To do the assessment work and patent the claims we need \$13,600. Incidentals will be something and we should make the amount \$15,000. Upon the basis of 2,300,000 shares issued each share of stock must contribute 6 52-100ths mills, or 65 and 2-10th cents per 100 shares, which calls from me an advance of \$8,152.14, and holders of the balance of the stock \$6,843.86, making a total of \$14,996.

I am ready to advance my proportion, as above, if all the other stockholders will do likewise. If the assessment work is done before January 1st, next, the money must be paid at once. If you will join in this send me certified check, to the order of the company, for your proportion on a basis of 6 and 52-100ths mills for each share of stock held by you. If your check is accepted the company will send you its demand note, with interest at 6%, for the amount of your check.

Unless stockholders holding a substantial amount of the stock not held by me send in their checks I shall not go on with the work, but shall let the company work itself out as it may, which I assume means a receivership and sale of the property.

If checks are not accepted they will be returned to the sender.

Parties have already threatened a receivership and if this is done we can get the receiver discharged, provided the above plan is accepted by sufficient number.

I have given you all of the facts as I understand them, and can neither add to nor explain further. There are about 1,500 stockholders and you can appreciate that this circular letter is all I can send to them. Awaiting your decision, I am

Very truly yours,

FRANK L. BELL.

Filed: Mar. 20, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

RETURN OF RECEIVER TO ORDER OF SALE.

The undersigned receiver of Sunset Copper Mining Co., a corporation, the above named defendant, respectfully shows to the court:

I.

That on the 15th day of February, 1909, the above entitled court made an order directing said receiver to sell at public sale to the highest and best bidder, upon the terms stated in said order of sale, certain property belonging to Sunset Copper Mining Co., a corporation, the above named defendant. Reference is hereby made to said order for a more complete description of said property.

II.

That pursuant to said order said receiver gave due and legal notice as required by law and the order of the court at the time and place where said sale would be made.

III.

That on the 20th day of March, 1909, at 10:30 o'clock A. M. at the west front door of the court house in Snohomish County, Washington, said receiver offered for sale all of said property as directed by the order aforesaid.

IV.

That at said sale W. W. Black and Frank L. Bell were the only bidders for said property, and that said receiver sold the same, subject to confirmation by the court, to the said W. W. Black and Frank L. Bell for the sum of Forty thousand dollars (\$40,000.00).

V.

Said receiver further shows that said purchasers paid in cash the sum of Two thousand dollars (\$2,000.00) as required by said order and tendered in payment of the remaining twenty per cent (20%) of the purchase price outstanding receiver's receipts and duly adjudicated claims against said defendant for the sum of six thousand dollars (\$6,000.00).

VI.

Said receiver further shows that said sale was legally made and fairly conducted and that the price offered by said purchasers, to wit, the sum of Forty thousand dollars (\$40,000.) was the only offer tendered to said receiver for said property. Said property is described as follows, to wit: Thirty-six (36) quartz mining claims situated in the Index Mining District, in Snohomish County, Washington, and known as the Mountain Side No. 2; Mountain Side No. 3; Mountain Side No. 4; Ivy R., Mable; Lloyd B.; Sunset; Sunset Extension; Fourth of July; Fourth of July Extension; Star; Star No. 2; W. H. B.; Brown Bear; Black Bear; Black Bear Extension; Copper King; Copper King Extension; Miss Helen; Mono; Mono No. 2; River Side; Ravine; Ravine Extension; Success; Lebanon; Lebanon Extension; Glens Falls; Glens Falls Extension; Crown Point; Crown Point No. 2; Crown Point No. 3; and Lost Art. Also the north half of Section one (1) Township Twenty-seven (27) North, Range Ten (10) East, W. M. Also a tramway leading from said mining claims to the town of

Index and a bridge across the Skykomish River, said tramway and bridge being known as the Sunset bridge and tramway, also a sawmill erected upon said mining claims; also the compressor plant, water power, flumes, electric light plant, drills, tools, supplies, water and riparian rights, and all other mining machinery, appliances and appurtenances situate upon and about said mining claims and property to which said defendant has title, and all right, title and interest of the said defendant in and to said property, and all other property of defendant situated in Snohomish County, Washington.

Wherefore said receiver prays that the court will fix a time for hearing upon this return of sale and that at such hearing the court will make an order confirming said sale and directing the execution of conveyance to the purchaser.

Respectfully submitted,

JOHN B. FOGARTY, Receiver.

State of Washington, County of Snohomish, ss.

John B. Fogarty being first duly sworn on oath deposes and says: That he is the receiver named in the within and foregoing return of receiver to order of sale; that he has read the same, knows the contents thereof and that he believes the same to be true.

JOHN B. FOGARTY.

Subscribed and sworn to before me this 22nd day of March, 1909.

JOS. COLEMAN,

Notary Public in and for the
State of Washington, residing
at Everett.

Filed Mar. 22, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No.

OBJECTIONS TO CONFIRMATION OF SALE.

Comes now Nicholas Rudebeck for himself and in behalf of all other stockholders of the above named defendant Company similarly situated, and object and protest against the confirmation or approval by this court of the sale made of certain property belonging to said defendant corporation, which sale was made on the 20th day of March, 1909.

This protest and objection is made for the reasons and upon the grounds set forth in the affidavit of this affiant made and filed herein in support of his motion heretofore made for a postponement of said sale and for an order requiring the return of the books of the said defendant corporation to this state, and is likewise based upon all the records, papers and proceedings on file or of record in this cause, and for the further reason that the amount for which the property was sold was grossly inadequate.

NICHOLAS RUDEBECK.

Service admitted March 29th, 1909.

JOHN B. FOGARTY, Receiver.

Filed Mar. 29, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

OBJECTIONS TO CONFIRMATION OF SALE.

Now comes L. T. Reid, owner of Fifteen thousand shares of the capital stock in the defendant corporation, through and by his attorney Schuyler Duryee, of Everett, Washington, and for himself and on behalf of other stockholders in the defendant corporation, object to and protests against the approval and confirmation by this court of the purported sale on the 20th day of March, 1909, of property belonging to defendant corporation to W. W. Black and Frank L. Bell.

This objection and protest are founded in part upon the matter set forth in the affidavit of one Nicholas Rudebeck made and filed herein as a basis for said Rudebeck's motion for postponement of sale, and for production of all books, records, papers, accounts and documents of said defendant corporation.

For further good and sufficient reasons for objection to and protesting against the confirmation of the sale aforementioned, it is hereby alleged:

1. That the proceedings herein and the records of the defendant corporation show that its affairs have been grossly mismanaged. The trustees certified that the increased capital stock to \$2,000,000 was fully paid, whereas it was not; they filed amended articles of incorporation increasing the number of trustees from three to five, without notice to the stockholders and without their knowledge or assent; they voted the treasury stock amounting to

794,000 shares for their re-election; they sold or agreed to sell 200,000 shares for their re-election; they sold or agreed to sell 200,000 shares of the proposed increase of capital to \$3,000,000 at 21½ cents a share before the increase was authorized; they adopted a resolution exculpating themselves from any obligation or liability whatever by reason of their having sold any of the stock of the company below par. And in all of these transactions W. W. Black was a prime factor.

II. That the minority stockholders in and of said defendant corporation have not had their day in court for they have been practically abandoned without notice by the officers and trustees of said defendant corporation, by the failure and refusal of said officers and trustees to protect or attempt to protect the interests of said defendant corporation and of the minority stockholders therein and thereof.

III. That the only official of said defendant corporation in the State of Washington during the few years past, as your protestant is advised, was and is W. W. Black, resident trustee.

IV. That in, during, and under the present cause of action the said Black has not, so far as disclosed by the records and proceedings herein, made any effort or attempt to save and protect the defendant corporation from unlawful and unjust claims.

V. That Frank L. Bell was elected trustee, qualified as such, and acted as such in the defendant corporation according to the records thereof, notwithstanding said Bell's affidavit to the contrary made and filed herein on the 20th day of March, 1909. The records also show that said Bell was and is a stockholder in said defendant corporation irrespective of the stock assigned to him by Ellen C. Baldwin, notwithstanding his affidavit to the contrary made and filed herein.

VI. That the record of proceedings of the defendant corporation show that the trustees refused to ratify and confirm the acts of the president and secretary of defendant corporation in issuing notes to the amount of Ten

thousand dollars to Ellen C. Baldwin in November, 1903. And the records also disclose that the note for \$4,263.60 dated August 3, 1904, and possibly the note for \$4,649.50 dated September 17th, 1904, are illegal and invalid.

VII. That if the notes amounting to nearly \$30,000 alleged to have been issued by the defendant corporation to one Ellen C. Baldwin be valid obligations of the defendant then the said defendant has a legal and valid defense thereto, in that the said Baldwin is indebted to the defendant corporation to the amount of her unpaid stock which is more than sufficient to liquidate any and every claim that she or her assignee Frank L. Bell may have or can have against the defendant corporation. The courts have held that where an insolvent corporation in the hands of a receiver is indebted to a stockholder, and the stockholder is also insolvent, the court will not allow such stockholder to participate in the distribution of the assets, but will offset his interest in the assets against his statutory liability on his stock, even though the stockholder has assigned to another his interest in the assets.

VIII. The court decreed that notice to the creditors of said defendant corporation be given by publishing a notice substantially as set out in the order of the court. And the decree also provided that any person interested may file objections to the allowance of said claims on or before February 10, 1909. A notice was duly published to the creditors to file claims but no notice was published to the stockholders to file objections. Therefore, the stockholders were not advised of the proceedings and did not have an opportunity to object to any of the claims of the creditors within the period named.

IX. That the management of the defendant corporation during the five years last past shows a total disregard for the rights of the minority stockholders. That the minority stockholders have the right to demand and in their behalf a demand is hereby made for full, complete, and unrestricted access to all books, papers, accounts, documents, and records belonging or in any wise pertaining to the defendant corporation, before the rights of the minority stockholders are foreclosed; and that the confirmation of the pretended sale of defendant's property

to W. W. Black and Frank L. Bell, whom the minority stockholders verily believe aided and assisted in placing the defendant corporation in its present condition, be postponed and deferred until all books, papers, accounts, documents and records belonging to the defendant corporation or pertaining in any wise to the management thereof are produced and the minority stockholders have an opportunity to inspect them.

X. That W. W. Black, resident trustee of defendant corporation has failed and refused to produce for inspection (although requested so to do) the contract entered into on or about June 14, 1904, between W. W. Black and H. W. Holmes and the Northern Pacific Railway Company wherein said company agreed to convey when patented the north half of section 1, township 27 N. range 10 East W. M.

XI. That the said W. W. Black has failed and refused to produce for inspection (although requested so to do) the minutes of the proceedings of the board of trustees of defendant corporation since August 20, 1904.

XII. That the defendant's properties are exceedingly valuable, and the price at which they were sold or attempted to be sold on March 20, 1909, is absurdly low, for the mining claims have valuable standing timber thereon which experts value at \$40,000 according to the circular issued by Frank L. Bell on November 16, 1908, a copy of which is attached to the affidavit made and filed herein by said Bell.

Dated at Everett, Wash., March 30, 1909.

Respectfully submitted,

SCHUYLER DURYEE,

Attorney for Protestant.

Service admitted March 31, 1909.

JOHN B. FOGARTY, Receiver.

Filed Mar. 31, 1909. JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

NOTICE.

To Nicholas Rudebeck, L. T. Reid and Milo A. Root and
Schuyler Duryee, their Attorneys.

You and each of you are hereby notified that the above named plaintiff, Frank L. Bell, by his undersigned attorney will on Monday, April 5th, 1909, at the hour of 10 o'clock A. M. or as soon thereafter as counsel can be heard, before the Hon. George A. Joiner, sitting as Presiding Judge of the above entitled Court, at the Superior Court Room of the Court House of Snohomish County, Washington, bring on for trial and determination the exceptions of the above named parties to the Receivers return of sale in the above entitled action, and will at said time and place apply to the Court for an order approving and confirming said Receivers Sale and ordering the Receiver of above named Defendant to convey all of the property sold by the Receiver to the bidders at said sale.

JOHN SANDIDGE,

Attorney for Plaintiff.

Last pleading served. Exceptions to sale.

Attorneys:

For Plaintiff, John Sandidge.

For Defendant, D. W. Locke.

For Objectors, Milo A. Root and Schuyler Duryee.

Issue upon exceptions to Receivers Sale.

Service of a copy of the above notice is hereby acknowledged, this April 1st, 1909.

SCHUYLER DURYEE,

Attorney for L .T. Reid.

MILO A. ROOT, by O. D.,

Attorney for N. Rudebeck.

JOHN B. FOGARTY, Receiver.

D. W. LOCKE.

Filed April 1, 1909:

JOHN R. DALLY, County Clerk.

*In the Superior Court of the State of Washington in and
for the County of Snohomish.*

FRANK L. BELL, Plaintiff,

vs.

SUNSET COPPER MINING COMPANY, a Corporation, Defendant.

No. 9510.

ORDER CONFIRMING SALE.

This cause coming on regularly for hearing in open Court, this day on the motion of Frank L. Bell, the above named plaintiff, for an order confirming the sale of all the property belonging to said defendant, made on the 20th day of March, 1909, and upon said hearing the said plaintiff appearing by his attorney, John Sandidge, and the defendant appearing by its attorney, D. W. Locke, and Nicholas Rudebeck, one of the objectors to the confirmation of such sale, appearing by his attorney, Milo A. Root, and L. T. Reid, another of the objectors to the confirmation of such sale, appearing by his attorney, Scholor Duryee, and the Receiver herein, J. B. Fogarty, Esq., appearing in person, and after considering the affidavits filed by the respective parties and after hearing the arguments of counsel, and being fully advised in the premises, it appearing to the Court that said sale was regularly made and fairly conducted and that the same should be confirmed, and that the court being now in all things fully advised in the premises, it is hereby ordered, adjudged and decreed that said sale and said proceedings be and the same are hereby confirmed.

It is further ordered, adjudged and decreed that the Receiver of above named defendant be and he is hereby directed to execute and deliver to Frank L. Bell and W.

W. Black, the purchasers at said sale, proper and legal conveyances for said property sold said parties by said Receiver on the 20th day of March, 1909.

Done in open Court this 5th day of April, A. D. 1909.

GEO. A. JOINER, Judge.

Filed Apr. 5, 1909. JOHN R. DALLY, County Clerk.

Indorsed: Plaintiffs Exhibit B. United States District Court, Western Dist. of Washington. Filed Apr. 21, 1914.

[Plaintiff's Exhibit P]

Article No. 13637

Certified Copy No. 9212

*United States of America, The State of Washington,
Department of State.*

To all to Whom These Presents Shall Come:

I, I. M. Howell, Secretary of State of the State of Washington and custodian of the Seal of said State, do hereby certify that I have carefully compared the annexed copy of the amended

**ARTICLES OF INCORPORATION OF THE SUNSET
COPPER MINING COMPANY**

with the original copy of said amended Articles of Incorporation now on file in this office, and find the same to be a full, true and correct copy thereof, and of the whole of said original, together with all official endorsements thereon. And I further certify that the said amended Articles appear to have been duly and regularly filed in this office, according to law, and that the same are of a genuine, valid and subsisting character, and that this certificate is in due form, and by the proper officer having the legal custody of said original and the requisite official knowledge relative thereto.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington. Done at the Capitol, at Olympia, this 15th day of April, A. D. 1914.

(SEAL)

I. M. HOWELL,
Secretary of State.

By J. GRANT HINKLE,
Assistant Secretary of State.

Comp'd M-G-A-O To S-M-C
No. 13637

CERTIFICATE AS TO THE INCREASE OF THE CAPITAL STOCK OF THE SUNSET COPPER MINING COMPANY, A CORPORATION.

This is to Certify, That a meeting of the stockholders of the Sunset Copper Mining Company, a corporation organized and existing under and by virtue of the laws of the State of Washington, was held at the office of said company in the City of Everett, State of Washington, the principal place of business of said company, at 2 o'clock P. M. on August 22, 1903, pursuant to a notice of which the following is a copy:

NOTICE OF STOCKHOLDERS MEETING.

Notice is hereby given that a special meeting of the stockholders of the Sunset Copper Mining Company will be held at the office of Holmes and Husted, rooms 15 and 16 Colby Building, in the City of Everett, Snohomish County, Washington, on the 22nd day of August, 1903, at 2 o'clock in the afternoon for the purpose of voting upon a question of increasing capital stock of said Sunset Copper Mining Company from two million shares to three million shares and for the transaction of such other business as may come before the meeting.

Dated this 25th day of June, 1903.

HENRY W. HOLMES,
JOHN E. McMANUS,
W. W. BLACK.

All the trustees of the Sunset Copper Mining Company, which notice was signed by all the trustees of said company and was published in Everett, Snohomish County, Washington, as is shown by the proof of publication hereto annexed and marked Exhibit "A."

There were presented and represented 1,420,199 shares of the capital stock of said Sunset Copper Mining Company, 68,000 shares present; 1,352,199 shares present by proxy, 1,420,199 shares being more than two-thirds ($\frac{2}{3}$) of the two million shares of the capital stock of said company.

It is further certified that at said meeting the following resolution was made, seconded and carried:

Resolved that the capital stock of the Sunset Copper Mining Company be increased from the present amount of two million shares to three million shares; said increase be divided into one million shares of the par value of One Dollar each.

Said resolution having received 1,420,199 votes in favor of said resolution, said votes being cast by the holders of 1,420,199 shares of the capital stock of said company cast by the holders of said stock in person or by proxy. The said stock being more than two-thirds $\frac{2}{3}$ of the entire capital stock of said company. No votes were cast against said resolution and the resolution was duly declared carried.

A motion was duly made, seconded and unanimously carried directing the president and secretary of said meeting to make and file this certificate as required by law and the trustees of said corporation were by motion unanimously carried to certify to said certificate as required by law. It was further represented and shown to said meeting that the capital stock of said company, to-wit: Two million shares of the par value of One dollar each had been fully paid for by the conveyance of mining claims and the payment of certain moneys and the performance of certain labor and services and that said two million shares of said par value of one dollar each have been paid for. It was further shown and represented to said meeting that there were no outstanding debts or liabilities of said company.

We certify that the foregoing facts are true and correct.

JOHN C. DENNY,
President of said Stockholders
meeting.

H. W. HOLMES,
Secretary of said stockholders
meeting.

Subscribed and sworn to before me this 22nd day of August, 1903.

EARL W. HUSTED
Notary Public
State of Washington
Commission Expires
June 17, 1906

EARL W. HUSTED,
Notary Public in and for the
State of Washington, residing
at Everett, Snohomish County,
Washington.

We, the undersigned, being all of the trustees of the Sunset Copper Mining Company, a corporation duly organized and existing under and by virtue of the laws of the State of Washington, do hereby certify that the foregoing certificate is true and correct statement of the proceedings had at the meeting of the stockholders of Sunset Copper Mining Company held on August 22, 1903, for the purpose of increasing the capital stock of said Sunset Copper Mining Company from two million shares of the par value of One Dollar each to three million shares of the par value of One Dollar each, and that the foregoing certificate is in every respect true and correct.

Dated at Everett, Wash., Aug. 22, 1903.

JOHN C. DENNY,
W. W. BLACK,
H. W. HOLMES,
W. G. SWALWELL,
E. M. METZGER.

All of the Board of Trustees of the Sunset Copper Mining Company.

In the matter of the Sunset Copper Mining Company.

State of Washington, County of Snohomish, ss.

I, G. A. Church, being first duly sworn on oath depose any say: That I am the head clerk of the Everett Weekly Herald, a weekly newspaper printed and published in the City of Everett, County of Snohomish, and State of Washington; that said newspaper is a newspaper of general circulation in said County and State, and that the Notice of Meeting, a printed copy of which is hereunto attached, was published in said newspaper proper and not in supplement form, in the regular and entire edition of said paper once each week for a period of eight consecutive weeks, beginning on the 27th day of June 1903 and ending on the 15th day of August 1903, both dates inclusive, and that said newspaper was regularly distributed to its subscribers during all of said period.

G. A. CHURCH.

Subscribed and sworn to before me this 21st day of August, 1903.

JAS. B. BEST

JAS. B. BEST,

Notary Public
State of Washington
Commission Expires
March 11, 1906

Notary Public in and for the
State of Washington, residing
at Everett, Snohomsh County.

NOTICE OF STOCKHOLDERS MEETING.

Notice is hereby given, That a special meeting of the stockholders of the Sunset Copper Mining Company will be held at the office of Holmes & Husted, in rooms 15 and 16, Colby building in the city of Everett, Snohomish county, Washington, on the 22nd day of August, 1903, at two o'clock in the afternoon for the purpose of voting upon the question to increase the capital stock of said Sunset Copper Mining Company from two million shares its present amount, to three million shares and for the transaction of such other business as may come before the meeting.

Dated this 25th day of June, 1903.

HENRY W. HOLMES,
JOHN E. McMANUS,
W. W. BLACK,

All of the trustees of the Sunset Copper Mining Company.

(Endorsed)

State of Washington, ss.

Filed for record in the office of the Secretary of State Oct 7 1903. Recorded Book 39 Page 462 Domestic Corporations.

SAM H. NICHOLS,

Secretary of State.

Indorsed. Case No. 2112 Plaintiff's Exhibit P. United States District Court Western Dist. of Washington, Buchler vs. Black et al., Filed Apr. 22, 1914. Frank L. Crosby, Clerk, By S. E. Leitch, Deputy.
Admitted.

[Plaintiff's Exhibit Q]

*United States of America, State of Washington, Office of
The Secretary of State.*

Order No. 9232.

I, I. M. Howell, Secretary of State of the State of Washington, do hereby certify that the records of this office show that the last license fee paid by the Sunset Copper Mining Company, of Everett, Washington, paid said company up to June 30th, 1905.

In testimony whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington, at the Capitol, in Olympia, this 21st day of April, A. D. 1914.

(SEAL)

I. M. HOWELL,

Secretary of State.

By J. GRANT HINKLE,

Assistant Sec'y of State.

Indorsed: Plaintiffs exhibit Q. United States District Court, Western Dist. of Washington, Buchler vs. Black, et al. Filed Apr. 22, 1914. Ruling Reserved.

[Excerpt from Defendants' Exhibit No. 7]

Everett, Wash., Jan. 15, 1904.

G. J. Buchler, Esq.,

Philadelphia, Pa.

Dear Sir:

Your letter of the 9th inst. has just been received. In reply allow me to say that I thank you for the confidence you showed in the Board of Trustees by sending me your proxy directing me to vote for the entire old board.

As you know the Sunset Copper Mining Company became indebted in a very large sum and that for several years it was in a condition of stagnation and there really was no market for stock here at any price. It could not be sold for 2c a share in the open market. Everybody was afraid that the property would be lost and the company could not raise money to pay the debts. When Mr. W. H. Baldwin appeared on the scene he made a proposition to take the treasury stock that was then on hand at 2½c a share which the board of trustees finally accepted and all the debts were paid with the money received except probably two or three hundred dollars of floating debts which has not yet been adjusted and settled. The facts are that it was supposed at the time that all the debts were paid but in investigating the old matters we have found some small claims which have not been paid, probably amounting to two or three hundred dollars. * * *

Ans. 2/7/04.

W. W. BLACK.

Indorsed: Defendants exhibit 7. United States District Court, Western Dist. of Washington, Buchler vs. Black et al. Filed Apr. 22, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. Admitted.

[Defendants' Exhibit 9]

H. W. HOLMES

Attorney

Rooms 15 and 16, Colby Building

Everett, Wash.

Feb. 18, 1909.

Mr. G. J. Buchler,

2163 N. 9th St.

Phila., Pa.

Friend Buchler:

Your letter of Feb. 13th came to hand this morning. The Sunset property is to be sold by receiver on the 20th of March to pay debts. I am unable to do a thing here.

Bell got a judgment in the federal Court in New York for something over twelve thousand Dollars. Ten Thousand of which was for services as attorney. Why did you permit this? We knew nothing about it until a transcript was sent here. There must have been an agreement by him with McNutt. He made service by serving the company through McNutt and then no one appeared for the Company and he took a default judgment. My hair was red when I learned this, but I was helpless in the matter. McNutt has a claim in for services and office rent for about \$1,200.00. I have Rudebeck interested and he is trying to do all he can to save the property for stockholders but it looks to me that we have lost out. I think suit must be brought in New York, if any, against Mrs. Baldwin or Bell and you know I have no money for that. I was waiting for Bell to put in his claim here. I would fight it, but he now has it in judgment in the New York Court and I am out.

I am investigating an irrigating proposition in Idaho, and may have something to submit to you later, but may not be able to tie it up at all. I would consider this better than mining. You having been in the West know something about it.

I think you could go after McNutt for burning the stock book. That would indicate fraud on the very face of it. But, I think we are out unless we pay the assessment stated in the circular sent out by Bell I never saw one of the circulars until handed me by a friend in Seattle. McNutt is a thief and as big a son of a bitch as Baldwin. I am not very good natured these days as a result of the Sunset affairs. I simply can not write.

Very truly yours,

H. W. HOLMES.

Feby 23d 1909

Indorsed: Case No. 2112, Defendants Exhibit 9. United States District Court, Western Dist. of Washington. Buchler vs. Black et al. Filed Apr. 22, 1914, Frank L. Crosby, Clerk, by S. E. Leitch, Deputy. Admitted.

[Defendants' Exhibit 13]

Frank L. Bell,
Walter W. Wait,
F. D. Morehouse,
Attorneys and Counsellors.

Village Hall

Glens Falls, N. Y.

February 11th, 1905.

Mr. G. J. Buchler,
Philadelphia, Pa.

Dear Sir:

I have your letter of yesterday and have noted the questions you ask of me.

To be exact about the debts the Sunset Company owes Mrs. Baldwin \$30,813.69, with interest from December 31st, last. H. W. Holmes claims that the company owes him \$1,000. for legal services but my judgment is this can be successfully defended. Outside of these two matters I think \$1,000. additional will cover everything.

The flume is 4,200 feet long and cost something over \$4,000. I cannot give you the cost of the compressor, saw mill, or Electric Plant. As to these matters I can say this, Last January (1904) after all of these improvements had been completed Mr. Black send on the cost and Mr. Baldwin was surprised and disappointed, and declined to pay for such expense. The result was that I went to Washington with him and we looked over the improvements and became thoroughly satisfied myself that the money had been well and economically expended. The flume is a splendid piece of work and could not have been bettered in price or anything else. The same is equally true of the other work.

The Sunset vein has been opened by three main surface workings. The Upper Tunnel is 250 long and cuts the vein at a depth of 130 feet below the surface, and has been drifted on for 100 feet; crosscuts were made on this drift and showed the vein to be 15 to 18 feet wide, with 1 & 1/2 feet of solid Pyrites of Copper and iron along the foot wall, and averages 5% clear across the vein.

The lower tunnel is 325 feet below the upper one, is 560 feet long and the vein is 18 feet wide all in ore. A drift has been run on this 100 feet all in ore and for the whole distance the copper averages 7%.

No work has been done on the Copper King but the surface indications show it to be much better than the Sunset vein.

I am giving you the above from what Mr. Clark gives me, and from personally having been over the ground what I believe to be the exact truth.

The company has spent something over \$4,000. in re-locating the old claims and also locating new claims. I found on looking up the old locations that they were very crude and concluded it was necessary to have the work done that the claims could surely be held. It was also necessary to do this for to make application for the patents and these applications are now on file. We also have a contract from the Northern Pacific Railway Co., for a deed for 320 acres which covers all the improvements and veins worked; this protects the property beyond question.

The stock of the company was increased before Mr. Baldwin bought in, and the 200,000 shares of additional stock was sold to him in the deal and the money used to pay back debts. No minority stockholder can complain of this for the company's books show that the original issue of stock was at from 1c to 20c. He who is in the same boat has no redress and one who purchases Mr. Baldwin's stock is protected from any action in behalf of any stockholder.

I desire to assure you that in my judgment every dollar that has been expended on this mine since Mr. Baldwin purchased his stock has been wisely spent and not a penny wasted. The only regret is that he did not have the money to continue the work.

It is unnecessary to consider the ability or honesty of Mr. Baldwin for if you and your friends should buy him out he will be entirely out of the company, with no stock, and you can proceed as you wish.

The property is certainly a cheap one at the price, and if you can interest anyone to buy who has the money to go on with the necessary work, I feel there can be no doubt about the outcome. We have several parties considering the purchase of the Baldwin interest and the first to accept will get it.

Mr. Baldwin and his wife hold the controlling interest in the company, and you can have all of their stock, and debts owing to them from the company, for \$175,000. provided, only, that you elect to purchase the same before anyone else buys.

I have a power of attorney to sell this interest, and if you can make the sale I will agree to pay you a commission, the same to be named by me before the transfer is made.

Very truly yours,

FRANK L. BELL.

Ans. 3/26/05

Indorsed: Case No. 2112 Defendants Exhibit 13, United States District Court, Western Dist. of Washington, Buchler vs. Black et al. Filed Apr. 22, 1914. Frank L. Crosby, Clerk, By S. E. Leitch, Deputy. Admitted.

[Defendants' Exhibit 17]

H. W. Holmes

Lawyer

Rooms 15-16 Colby Building

Sunset Phone 1189

Everett, Washington

Dec. 14th, 1908.

Mr. G. J. Buchler,

2163 N. 9th St.

Philadelphia, Pa.

Friend Buchler:

Yours of Nov. 18th. at hand and contents noted. That part of your letter in regard to my being a drunk etc. makes me laugh. I don't think myself that I am what you would call a popular man, but I have a great many good friends here. As to the drunk part Frank L. Bell took more booze out of the State of Washington, than I ever drank in all my life and he was not here much more than 10 days at that.

I send you a clipping from the P-I a Seattle paper which tells the situation of the Sunset. I suppose it will be sold to pay debts now.

I called on Mr. Judd and asked him if he had anything for me in regard to Sunset or other matters and he said no. So I let the matter drop.

As to the property of Mr. B—— I will say you have asked me a hard question. He is a large stock holder in the Sunnyside Land Co. This Company buys, sells and owns real-estate and loans money and I have no way of

knowing how much stock he has. He is also interested in the Glenwood Land Co. He owns the Verginia Hotel in his name worth \$30,000.00 and his home worth about \$10,000.00.

Bell is stringing you. Black had an option on the Baldwin interest and that was all he sold. The Company had nothing to do with it unless the property injured or something of that kind. You can see by the inclosed slip that Bell talks one thing and does another. He has no more reliability than the late W. H. Baldwin. Did you want me to get the legal description of these properties. I thin B—— is worth at least \$100,000.00. No one can buy any of the Sunnyside Land Co.'s stock. It is held by three persons and none of it for sale.

McGinity is still in Oregon and I understand is in the Telephone business. Just as big talking as ever. He could sell out for \$5000.00 but wanted seven thousand.

I did not get the mining property in Nevada that I expected and the party who was going to secure it for me came to me later and wanted to lease me some of his claims, but I would not listen to that. I am trying to get a prospector to go there or to Alaska. I do not know as he will go yet.

I told Black that I would turn the \$200.00 I owed on the option, toward the \$1000.00 I sued the Company for one year ago, but of course I could not do that as the option was on the Baldwin interest only and if any body owes me it is the company. I think I talked this matter over with you so you know where I stand. Let me hear from you often and I will get what you want if I can. I think we are up against the real thing now, but Bell must put his claim in and have it proved up and I will be on the spot when that is done.

Very truly yours,

Ans December 30, 08

H. W. HOLMES.

Indorsed: Case No. 2112. Defendants Exhibit 17. United States District Court Western Dist. of Washington. Buchler vs. Black et al. Filed Apr. 22, 1914. Frank L. Crosby, Clerk. By S E. Leitch, Deputy. Admitted.

[Defendants' Exhibit 21]

*State of Washington, Department of State, Office of the
Secretary, Olympia.*

I. M. Howell,

Secretary of State.

J. Grant Hinkle,

Asst. Secy. of State.

Apr. 16, 1914.

Robert McMurchie,

407 Amer. Bank Bldg.,

Everett, Wash.

Dear Sir:

In reply to yours of the 15th inst. re status of the Sunset Copper Mining Company, you are advised the records of this office show this company stricken Aug. 23, 1909, for failure to pay annual corporation license fees since the year 1905, and it has no legal corporate existence in this state, at this time.

A certificate to this effect, under seal of this office may be had upon receipt of the statutory fee of \$2. in M. O. or bank draft.

Very truly yours,

Dic. JGH/TMB

I. M. HOWELL,

Secretary of State.

Indorsed: Defendants exhibit 21. United States District Court Western Dist. of Washington, Buchler vs. Black et al., Filed Apr. 23, 1914. Frank L. Crosby, Clerk. By S. E. Leitch, Deputy. Admitted.

[Defendants' Exhibit 28]

This Indenture, Made this 1st day of July, 1908, between the Sunset Copper Mining Company, a corporation organized and existing under the laws of the State of Washington and having its principal business at Everett in said State, as party of the first part, and Hon. William W. Black, of Everett, Washington, and Frank L. Bell of Glens Falls, N. Y., as parties of the second part, and Hon. William W. Black of Everett, Washington, Ellen C. Baldwin and Frank L. Bell of Glens Falls, N. Y., as parties of the third part,

Whereas, The party of the first part is now indebted to divers persons for labor and supplies used by it in watching and doing assessment work on its property since January 1st, 1908, and it is necessary that it borrow further money with which to do the balance of the assessment work for said year 1908 to the end that it shall legally hold and own its mining property by the doing of such assessment work, and

Whereas, The parties of the second part have offered and are now willing to loan the party of the first part money to be used in doing such assessment work and on account thereof, but without liability upon their part to loan and particular sum or sums of money for such account.

Now, This Witnesseth: That the said party of the first part, in consideration of the premises, and of the sum of One & 00/100 dollars, to be paid, the receipt of which is hereby acknowledged, and other good and valuable consideration to it moving from the said parties of the second part, does hereby grant, release, convey, sell, assign, transfer and set over unto the said parties of the second part, their and each of their heirs and assigns forever, the North $\frac{1}{2}$ of Section No. 1, Township 27, Range 10, East of Willamette Principal Meridian, County of Snohomish and State of Washington, containing 320 acres of land, more or less, and all other property, real, personal or mixed, and all mining claims and interested therein, situate in the Index Mining District, Snohomish County, Washington, and all property wheresoever situate.

Also all real and personal property, rights, privileges, franchises, mining claims and property whatsoever which it now owns or which it shall at any time hereafter acquire.

This Grant is intended as security to the parties of the second part, and each of them, for any money or moneys which they shall loan or advance to the party of the first part in doing assessment work or used for other lawful purposes for the benefit of the party of the first part, and for any and all moneys which the parties of the second part, or either of them, shall expend upon doing assessment work on the mining claims of the party of the first part and for supplies and materials furnished or supplied by them in doing such work, provided that in any one year said parties of the second part shall not expend upon such work and for supplies and materials purchased or furnished by them to exceed the sum of \$4,000. but the time between now and January 1st, 1909, shall count as one year.

The party of the first part agrees to give to the parties of the second part its notes for all moneys which shall be loaned it by them under this indenture and to pay all moneys which the parties of the second part shall expend in doing such assessment work and for supplies and materials furnished by them. All moneys loaned by the parties of the second part hereunder or expended by them on such assessment work and for supplies and materials furnished by them shall be due and payable upon demand and shall draw interest at the rate of six per centum per annum from the date when loaned and expended for the party of the first part. Upon such money and interest being fully paid this grant shall be void otherwise to remain in full force.

In case default shall be made in the payment of the principal sum hereby intended to be secured, and secured, or in the payment of the interest thereon, or any part of such principal or interest as above provided, then it shall be lawful for the parties of the second part, or either of them, his or their heirs, executors, administrators or assigns, at any time thereafter to sell the property here-

by granted and assigned or any part or parts thereof in the manner provided by law, and out of all the moneys arising from such sale or sales to retain the amount then due for principal and interest, together with the costs and charges of making such sale or any action on this indenture, and the surplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, its successors or assigns.

And Whereas, The said parties of the third part are now creditors of the party of the first part, and hold its obligations in the way of notes, mortgages or judgments or some one or more thereof, or have an interest in or are interested in such claims; and also that they are large stockholders in the party of the first part or are interested in a large portion of its capital stock and are thereby interested in having the mining claims and property of the first part held by fully doing the assessment work required each year to be done, and to such end and for the purpose of inducing the parties of the second part to loan money under this indenture or to expend money in doing such assessment work and furnishing said company with supplies and materials, the said parties of the third part do hereby agree to and with each other, that any money or moneys loaned to said company by the party of the second part, or either of them, under this indenture, and all moneys which they or either of them shall expend in doing such assessment work or in furnishing said company with supplies and materials, shall by said company be paid before any claims, notes, judgment or mortgages now held by the parties of the third part, or either or them, or in which they or either of them have an interest, and that the lien created by this indenture shall be ahead of and prior to the lien of any mortgage, judgment or other claim of the parties of the third part or any or either of them. The provisions contained in this paragraph are agreed to by all of the parties to this indenture and each of said parties agree to faithfully and honestly keep and perform the same.

In Witness Whereof, the party of the first part has caused these presents to be executed in its corporate name, and its corporate seal to be hereunto affixed, and the parties of the second and third part have hereunto set their hands and seals, the day and year first above written to triplicate copies hereof.

(SEAL)

SUNSET COPPER MINING
COMPANY,

By H. C. McNutt, President.

A. G. SELLINGHAM,

W. W. BLACK,

E. M. METZGER,

Trustees.

W. W. BLACK, (L. S.)

FRANK L. BELL, (L. S.)

Parties of the Second Part.

ELLEN C. BALDWIN (L. S.)

W. W. BLACK. (L. S.)

FRANK L. BELL. (L. S.)

Parties of the Third Part.

State of New York, County of Warren, ss.

On this 7th day of July, 1908, before me personally came and appeared Henry C. McNutt to me known to be the president of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said mortgage or instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my seal the day and year first above written.

FRANK D. MOREHOUSE,
Notary Public.

State of New York, County of Warren, ss.

Henry C. McNutt, being first duly sworn on oath deposes and says, that he is the president of the Sunset Copper Mining Company, the above mentioned mortgagor, and makes this affidavit in behalf of said mortgagor; and that the above and foregoing mortgage is made in good faith and without any design to hinder, delay or defraud creditors or any creditor.

Subscribed and sworn to before me this 7th day of July, 1908.

H. C. McNUTT,
FRANK D. MOREHOUSE,
Notary Public.

State of New York, County of Warren, ss.

On this 24th day of July, 1908, before me the subscriber personally came Ellen C. Baldwin and Frank L. Bell to me known and known by me to be two of the individuals described in and who executed the foregoing instrument, and they thereupon severally acknowledged to me that they had executed the same.

FRANK D. MOREHOUSE,
Notary Public.

State of Washington, County of Snohomish, ss.

On this.....day of.....1908, before me the subscriber personally came William W. Black to me known and known by me to be the individual described in and who executed the foregoing instrument and he thereupon acknowledged to me that he had executed the same.

Indorsed: Mortgage. Dated July 1st, 1908. Defendants Exhibit 28. United States District Court, Western Dist. of Washington, Buchler vs. W. W. Black, et al. Filed Apr. 23, 1914. F. L. Crosby, Clerk. Adm.

[Excerpt from Defendants' Exhibit 15]

Glens Falls, N. Y. G., Oct 3, 1907.

G. J. Buchler, Philadelphia, Pa.

Dear Sir:—

Yours of the second at hand and in reply would say, The Sunset Copper Mining Company has never signed any contracts or agreements with the Trout Creek Copper Company.

We have never got out any annual reports since I have been interested in the Company.

I do not know exactly what the expenditure of the thirty thousand dollars was for. But as I understand it about five thousand was for machinery and the balance was for repairing rail roads and work in the mines. No doubt Mr. H. E. Heller of Index, Washington, assistant secretary of the Sunset Copper Mine could give you full particulars.

You asked me how the books of a Washington company should be in Glens Falls, N. Y. All the Companys books from the time that the company was orginized up to October 1905 are in Washington. I have never seen them. Since October 1905 we have kept a set of books here at this office, as the officers are here.

Yours truly,

H. C. McNUTT,

Ans. Oct. 14th, copy attached.

Indorsed: Defendant's exhibit 15. United States District Court, Western Dist. of Washington, Buchler vs. Black, et al. Filed Apr. 22, 1914. Frank L. Crosby, Clerk, by S. E. Leitch, Deputy. Admitted.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

(In Equity)

No. 2112

Stipulation

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

It is stipulated by and between O. C. Moore and George H. Walker, solicitors for complainant, and Frank L. Bell, one of the defendants, and heretofore appearing as his own solicitor, that Fletcher Lewis of Seattle, Washington, an attorney and solicitor of this court be, and he is hereby authorized to accept service or notice on behalf of said Frank L. Bell of all papers and proceedings in which service or notice may be necessary to perfect an appeal by said complainant to the United States Circuit Court of Appeals for the Ninth Circuit, provided that all such notices shall be timely served.

O. C. MOORE.

GEORGE H. WALKER.

FRANK L. BELL.

Indorsed: Stipulation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

*In the District Court of the United States, for the Ninth
Circuit Western District of Washington, Northern*

Division. (In Equity).

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Notice of Lodgment of Statement of Facts

To W. W. Black and Frank L. Bell, defendants in the above
entitled action, and to Messrs. Robert McMurchie, J. A.
Coleman and Lloyd L. Black, your attorneys:

You, and each of you, are hereby notified that the complainant has prepared and lodged in the office of the clerk a condensed statement of such portions of the evidence introduced at the trial of the above cause as is necessary and essential to a review of the questions which complainant proposes to present on appeal as grounds for the reversal of the final decree made and entered herein by the judge of said court on the 23rd day of June, 1914. You are hereby further notified that the complainant will, on the 21st day of December, A. D. 1914, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, apply to the Hon. Jeremiah Neterer, Judge of said court, at his courtroom in the City of Seattle, Washington, for the approval of said statement.

O. C. MOORE, and
GEORGE H. WALKER,

Counsel and Solicitors for Complainant.

Received a copy of the within Notice of Lodgment together with a copy of proposed condensed statement of facts, due and timely service whereof is hereby admitted this 7th day of December, 1914.

R. McMURCHIE.

L. L. BLACK,

Solicitors for Defendant Black.

FLETCHER LEWIS,

Solicitor for Defendant, Bell.

Indorsed: Notice of Lodgment of Statement of Facts. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

*In the District Court of the United States, for the Western
District of Washington, Northern Division.*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, Defendants.

No. 2112

Assignments of Error

Comes now the complainant in the above entitled cause and says that in the decree herein made and entered on the 23rd day of June, 1914, there is manifest error and files the following assignments of errors committed and happening in the said cause upon which he will rely in his appeal from said decree.

I.

The court erred in holding that there was no evidence before it of any collusion between the defendants Black and Bell with relation to the conduct of the business of defendant company.

II.

The court erred in holding that there was no evidence before it to justify the conclusion that either defendants Black or Bell exercised any undue influence of any character in any of the proceedings referred to in the complaint.

III.

The court erred in holding that there was no evidence before it that any information with relation to the conditions or status of defendant company's property was at any time withheld from the plaintiff.

IV.

The court erred in holding that the plaintiff was guilty of laches and was thereby precluded and barred from maintaining this suit.

V.

The court erred in holding that the action of the state court in approving the claims filed with the receiver by defendants Black and Bell over the objection of a minority stockholder, other than the plaintiff herein, is *res adjudicata* of this suit.

VI.

The court erred in holding that the confirmation of the receiver's sale of the assets of the defendant company over the objection of a minority stockholder, other than the plaintiff herein, is *res adjudicata* of this suit.

VII.

The court erred in refusing to hold defendants Black and Bell, or either of them, as trustees of the property of defendant corporation bid in by them at the receiver's sale, for the use and benefit of said corporation and its stockholders.

VIII.

The court erred in holding valid the proceedings had in the suit brought by defendant Frank L. Bell in the Superior Court of Washington for Snohomish County against the Sunset Copper Mining Company, wherein the assets of said company were sold by the receiver under order of court and purchased by defendants Frank L. Bell and W. W. Black.

IX.

The court erred in holding valid the receiver's sale of the assets of defendant corporation had in the foreclosure suit brought by defendant Bell in the Superior Court of Washington for Snohomish County.

X.

The court erred in holding that the evidence introduced at the trial on behalf of complainant was insufficient to entitle complainant to any relief.

XI.

The court erred in holding that complainant's bill was without substantial equity and in dismissing the same and denying the relief therein prayed for.

XII.

The court erred in denying complainant's petition for a rehearing.

O. C. MOORE and
GEORGE H. WALKER,
Solicitors for Complainant.

Received a copy of the within Assignment of Errors due and timely service whereof is hereby admitted this 7th day of December, 1914.

L. L. BLACK and
R. McMURCHIE,
Solicitors for Defendant Black.

FLETCHER LEWIS,
Solicitor for Defendant Bell.

Indorsed: Assignment of Errors. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern*

Division. (In Equity).

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Petition for Appeal

The above named complainant, G. J. Buchler, conceiving himself to be aggrieved by the final decree and order of court made and entered in this cause on the 23rd day of June, 1914, hereby appeals therefrom, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit and prays that his appeal be allowed and that a transcript of so much and such portions of the record, proceedings and papers, upon which said final decree, order and judgment was made, as may be necessary and essential to a review and decision of the questions presented by this appeal, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

And now, at the time of the filing of this petition for appeal, the complainant files an assignment of errors, setting forth separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

G. J. BUCHLER,
Complainant,

By O. C. MOORE and
GEORGE H. WALKER,
His Solicitors.

Service of the within Petition for Appeal, by receipt of a true copy thereof .admitted this 7th day of December, A. D. 1914.

L. L. BLACK and

R. McMURCHIE,

Solicitors for defendant Black.

FLETCHER LEWIS,

Solicitor for defendant Bell.

Indorsed: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 7, 1914. Frank L. Crosby, Clerk. By E. M. L. Deputy.

In the District Court of the United States, for the Ninth Circuit, Western District of Washington, Northern

Division. (In Equity).

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Order Allowing Appeal.

On reading and filing complainant's petition for an appeal and assignment of errors in the above entitled cause, it is hereby ordered that an appeal be and is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree heretofore rendered and entered herein on the 23rd day of June, 1914, and that a certified transcript of so much and such portions and parts of the record, testimony, exhibits, affidavits and proceedings herein, upon which said decree was based, as may be essential to a review and decision thereof on this appeal, duly authenticated, be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

It is further ordered that the bond on appeal be, and is hereby fixed at the sum of \$300.00.

Done in open court this 22nd day of December, A. D. 1914.

JEREMIAH NETERER, Judge.

Indorsed: Order Allowing Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 22, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern
Division. (In Equity).*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Bond on Appeal

Know all men by these presents, That we, G. J. Buchler, as principal and The American Surety Company, of New York, a corporation organized and existing under and by virtue of the laws of the state of New York, doing business in the state of Washington under and by virtue of the laws thereof, as surety, are held and firmly bound to W. W. Black, Frank L. Bell and Sunset Copper Mining Company, a corporation, defendants above named in the sum of three hundred and no/100 Dollars, for the payment of which well and truly to be made, we bind ourselves jointly and severally, and each of our successors and assigns, firmly by these presents.

Signed, sealed and dated this 23rd day of December,
A. D. 1914.

Whereas the above named complainant has prosecuted and appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse a decree rendered in the above entitled cause in the District Court of the United States for the Western District of Washington, Northern Division on the 23rd day of June, 1914,

Now Therefore, the conditions of this obligation are such that if the above named complainant, G. J. Buchler, shall prosecute said appeal to effect and answer all costs if he fails to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

G. J. BUCHLER,
By O. C. MOORE,
GEORGE H. WALKER,
His Solicitors.

(SEAL)

AMERICAN SURETY COM-
PANY OF NEW YORK,
By EDWARD J. LYONS,
Its Resident Vice-President.

Attest: S. H. MELROSE,
Its Resident Ass't. Secretary.

The foregoing bond is approved, both as to form and sufficiency of surety, this 23rd day of December, A. D. 1914.

JEREMIAH NETERER,
Judge before whom said cause
was tried.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 23, 1914. Frank L Crosby, Clerk. By Ed. M. Lakin, Deputy.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern
Division. In Equity.*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Citation. (Lodged Copy)

The President of the United States to W. W. Black and
Frank L. Bell:

You are hereby cited and admonished to be and appear
at the United States Circuit Court of Appeals for the
Ninth Circuit to be held at the City of San Francisco
within thirty (30) days from the date of this writ, pur-
suant to an appeal filed in the Clerk's office of the District
Court of the United States for the Western District of
Washington, Northern Division, wherein G. J. Buchler is
appellant and you are respondents to show cause, if any
there be, why the judgment in said appeal mentioned should
not be corrected and speedy justice should not be done to
the parties in that behalf.

Witness the Honorable Edward Douglas White, Chief
Justice of the Supreme Court of the United States of
America, this 22 day of Dec., A. D. 1914, and of the Inde-
pendence of the United States the One Hundred and Thirty-
eighth.

(SEAL)

JEREMIAH NETERER,

United States District Judge.

Attest: FRANK L. CROSBY,
Clerk of said Court.

Service of the foregoing citation, by the delivery of a copy thereof, hereby admitted this 22 day of December, A. D. 1914.

ROBT. McMURCHIE and

LLOYD L. BLACK,

Solicitors for Respondent W.

W. Black.

FLETCHER LEWIS,

Solicitor for acceptance of
service for Respondent Frank
L. Bell.

Indorsed: No. 2112. In the District Court of the United States for the Western District of Washington, Northern Division. G. J. Buchler, Plaintiff, vs. W. W. Black, Frank L. Bell and Sunset Copper Mining Company, a corporation, Defendants. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 22, 1914. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. George H. Walker and O. C. Moore, Attorneys for Complainant, 705-6-7 Central Bldg., Seattle, Wash.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Order Enlarging Time to File Transcript

Now on this 13th day of January, 1915, upon motion of Solicitors for Complainant, and for sufficient cause appearing, it is ordered that the time within which the Clerk of this Court may prepare, certify and transmit to the United States Circuit Court of Appeals the transcript of the record in this cause be, and the same is hereby extended to and including the 1st day of March, 1915.

JEREMIAH NETERER,
District Judge.

Indorsed: Order Enlarging Time to File Transcript.
Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 13, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the District Court of the United States, for the Ninth
Circuit, Western District of Washington, Northern
Division. (In Equity).*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Præcipe

To the Clerk of said Court:

You will please prepare and have printed under your direction, in accordance with Act of Congress of February 13, 1911, Rule 31 of the United States Supreme Court, and the order thereon promulgated by the United States Supreme Court March 13, 1911, certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit the following records, proceedings and papers in the above entitled cause:

Bill of complaint omitting Exhibit "A" attached thereto; Subpoena on Bill of Complaint and Sheriff's Return thereon, filed March 28, 1912; Motion to Amend Bill of Complaint and Order permitting amendment, filed December 13, 1912; Answer of defendant Black, filed November 26, 1913;; Answer of defendant Bell filed December 29, 1913; Order entered on complainant's Motion to Strike, filed February 24, 1913; Stipulation filed January 17, 1914; Stipulation re proving record of Bell vs. Mining Company, No. 3554, U. S. Circuit Court for Northern District of New York, filed April 21, 1914; Decision of Judge Neterer on final hearing, filed May 18, 1914; Decree dismissing cause, filed June 23, 1914;

Also the following portions of Petition for re-hearing, filed June 23, 1914, to-wit: all of p 1; all of p 2 except the last paragraph thereof; that part of pp 9 and 10 beginning with the last paragraph on p 9 and ending on the 12th line of p 10; all of the last paragraph on p 11;

Decree and order denying petition for re-hearing;

Condensed Statement of Facts;

The following portions of complainant's Exhibit "B," to wit: pp 1-15 inclusive; p 18; pp 20-27 inclusive; p 40; pp 45-48 inclusive; pp 54-58 inclusive; p 61; p 75; pp 93-104, inclusive; and p 116;

Also complainant's Exhibit "P" and "Q";

Also the following portion of Defendants' Exhibit 7, to wit: First and second paragraphs thereof with the date and address, and the notation "Ans. 2/7/04" found at end of letter.

Also Defendants' Exhibits 9, 13, 17, 21 and 28; also that part of Defendants' Exhibit 15 which is letter from McNutt to Buchler dated October 3, 1907;

Stipulation filed December 7, 1914 appointing Fletcher Lewis solicitor to accept service for defendant Bell;

Also all papers and proceedings on appeal.

O. C. MOORE,
GEORGE H. WALKER,
Solicitors for Complainant.

Service of the foregoing Praecept by receipt of a true copy thereof admitted this 22nd day of December, 1914.

ROBT. McMURCHIE and
LLOYD L. BLACK,
Solicitors for Respondent, Black.

FLETCHER LEWIS,
Solicitor for acceptance of
service for Respondent, Bell.

Indorsed: Praecept. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Dec. 22, 1914. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the District Court of the United States for the Western
District of Washington. Northern Division.*

G. J. BUCHLER, Complainant,

vs.

W. W. BLACK, FRANK L. BELL and SUNSET COPPER MINING
COMPANY, a Corporation, Defendants.

No. 2112

Certificate of Clerk U. S. District Court to Transcript of Record

United States of America, Western District of Washington,
ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing printed pages numbered from 1 to 203, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, exhibits, and other proceedings in the above and foregoing entitled cause as are necessary to the hearing of said cause in the United States Circuit Court of Appeals for the Ninth Circuit, and as is called for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by on behalf of the Complainant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to wit:

Clerk's Fee (Sec. 828 R. S. U. S.) for making record, certificate or return—557 folios at 15c	\$ 83.55
Certificate of Clerk to transcript of record—3 folios at 15c45
Seal to said Certificate20
Statement of cost of printing said transcript, collected and paid	180.00
	\$264.20

I hereby certify that the above cost for preparing, certifying and printing said record amounting to.....\$264.20 has been paid me by Messrs. O. C. Moore and George H. Walker Solicitors for Complainant.

I further certify that I hereby attach and herewith transmit the original Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 18th day of February, 1915.

(SEAL)

FRANK L. CROSBY, Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

G. J. BUCHLER, *Appellant*,

vs.

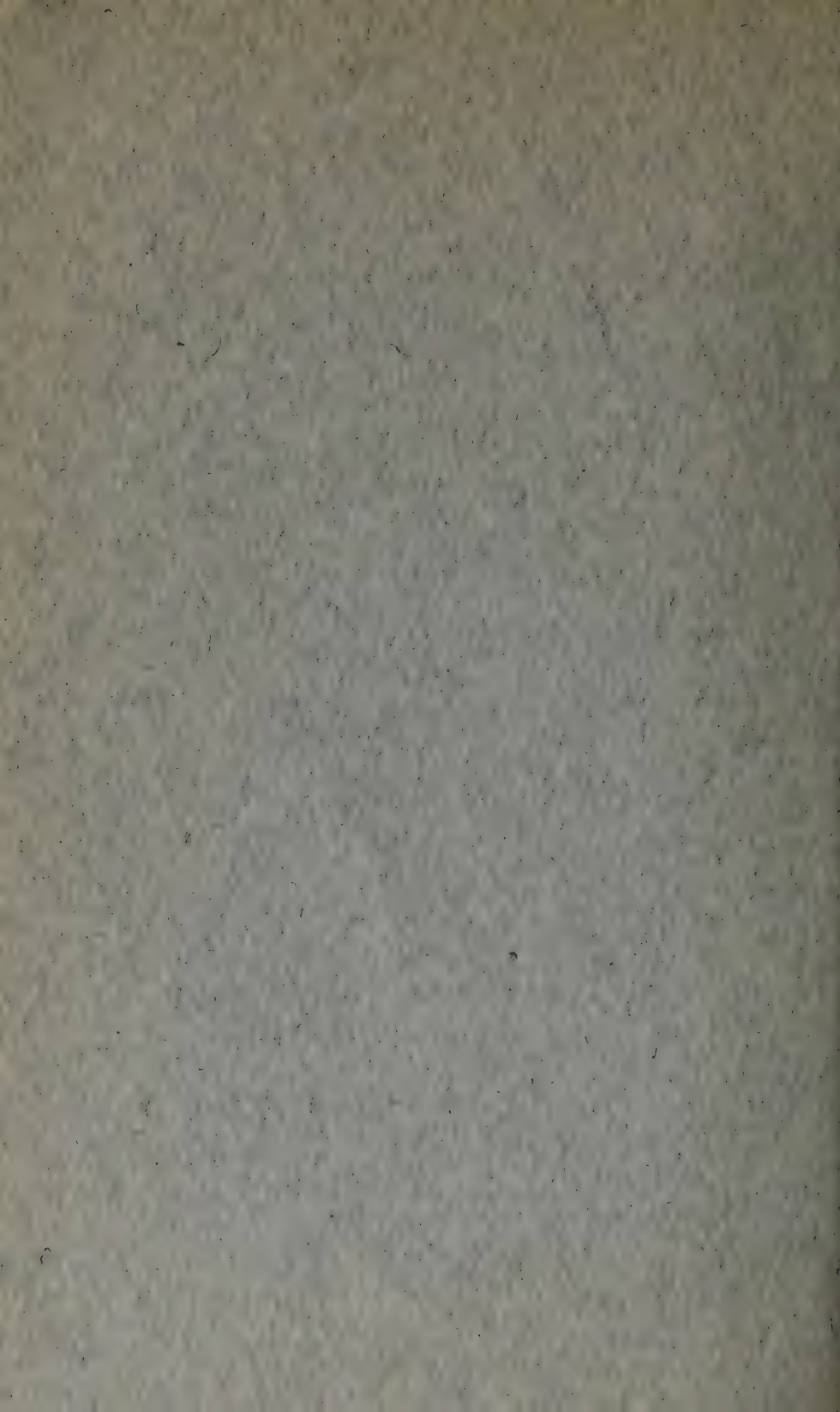
W. W. BLACK, FRANK L. BELL,
and SUNSET COPPER MINING
COMPANY, a Corporation,
Appellees.

APPELLANT'S OPENING BRIEF.

*Upon Appeal from the United States District
Court for the Western District of Wash-
ington, Northern Division.*

O. C. MOORE,
Solicitor and Counsel for Complainant,
501 Peyton Building, Spokane,
Washington.

GEORGE H. WALKER,
Solicitor and Counsel for Complainant,
705-6-7 Central Bldg., Seattle,
Washington.



No.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

G. J. BUCHLER, *Appellant*,

vs.

W. W. BLACK, FRANK L. BELL,
and SUNSET COPPER MINING
COMPANY, a Corporation,
Appellees.

APPELLANT'S OPENING BRIEF.

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No.

IN THE
United States Circuit Court of Appeals
FOR THE
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G. J. BUCHLER, *Appellant*,

vs.

W. W. BLACK, FRANK L. BELL,
and SUNSET COPPER MINING
COMPANY, a Corporation,
Appellees.

APPELLANT'S OPENING BRIEF.

*Upon Appeal from the United States District
Court for the Western District of Wash-
ington, Northern Division.*

STATEMENT OF CASE.

The Appellant, G. J. Buchler, Complainant below, a stockholder in the Sunset Copper Mining Company, instituted and maintains this suit on behalf of himself and other stockholders. The bill of complaint was filed and subpoena issued on March 26th, 1912 (Tr. 20). Appellee Sunset Copper Mining Company, which for convenience will be referred to as "The Company," is a cor-

poration organized under the laws of Washington with its principal place of business at the town of Everett and was the owner of certain mining properties in said State. Appellees Black and Bell jointly purchased, at the hereinafter described judicial sale, and are now the paper owners of the assets of The Company, here in controversy. Black was Judge of the Superior Court of Washington for Snohomish County during the period covered by this controversy (Tr. 99, 105) and he was likewise, during said period, a trustee and general manager of The Company (Tr. 99). The majority of the trustees of The Company lived at Glenn Falls, New York, though The Company had never complied with the laws of New York respecting foreign corporations doing business in that State (Tr. 71, 72).

During the years 1904 and 1905, the Company executed two mortgages on its mining properties in favor of one, Ella Baldwin, of Glenn Falls, New York, for the sum of \$29,384.10, which were subsequently transferred to Bell.

On November 30th, 1908, Respondent Bell caused a summons and complaint for the foreclosure of said mortgages, so held by him, to be served on H. C. McNutt, the President of The Company in the State of New York, and the complaint and summons were filed in the office of the Clerk of the Superior Court of Washington

for Snohomish County on December 9th, 1908 (Tr. 114, 119). The summons, so served, is in the form prescribed by the statutes of Washington for personal service within the State and required an appearance within twenty days after service (part of Plaintiff's Exhibit "B"; Tr. 114). The complaint in this suit (Tr. 115), in addition to asking for the foreclosure of said mortgages, alleges insolvency on the part of The Company and prays for the appointment of a receiver. On the date of the service of said summons and complaint, a notice was also served on said McNutt in the State of New York to the effect that an application for the appointment of a receiver for The Company would be made at the hour of 9:30 o'clock A. M. on the 9th day of December, 1908 (Tr. 121). Said McNutt assumed to acknowledge "Due and timely service" of both summons and complaint and notice (Tr. 119, 121). There was no pretense of an appearance in said cause on behalf of The Company until January 30th, 1909 (part of Plaintiff's Exhibit "B"; Tr. 130; Testimony of D. W. Locke, Tr. 96). Notwithstanding the date, December 9th, designated in the notice, no proceedings were had at that time, though on the following day, December 10th, 1908, an *ex parte* order was made and entered in said Superior Court, appointing one John B. Fogarty, as temporary receiver of the assets of The Company (Tr. 125). In these and all subsequent proceedings in said case Bell

was represented by one John Sandidge, who testified that he was selected and retained for that purpose by Black (Tr. 93, 94), and receiver Forgarty testified that he likewise owed his appointment to Black (Tr. 97).

After the appointment of the temporary receiver Black procured one D. W. Locke to enter an appearance as attorney on behalf of The Company (Tr. 96), and though, according to his testimony, he was advised by Black and was satisfied from his own investigations that there was no defense available in the foreclosure suit, he subsequently, on January 30th, 1909, the day the final decree was rendered, entered an appearance as Attorney for The Company (part of Plaintiff's Exhibit "B"; Tr. 130). No defense of any kind was made or attempted by Locke on behalf of The Company and no other appearance was made by him in the case than the one just indicated (Tr. 96). On the date of this appearance, January 30th, 1909, a Judge *Pro Tempore*, selected and appointed by Black (Tr. 96), entered an order and decree continuing the temporary receiver as permanent receiver of The Company and directing that no new or additional bond should be given by said receiver, but that the bond theretofore given by him as temporary receiver should be continued and remain in force as his bond as permanent receiver. By the same decree Bell was awarded

judgment in accordance with the prayer of his complaint for the sum of \$37,501.75, together with his costs (Tr. 132, 133).

Though brought for the foreclosure of a mortgage, that phase of the suit was entirely abandoned by Bell, and the receiver proceeded to a sale of the mortgaged property of The Company, without regard to the mortgage. Notice was given to creditors and the report of the receiver shows, among other claims allowed, one presented by Black for the sum of \$10,923.21, and another by Bell for the sum of \$12,767.57, the latter being the amount of a judgment obtained by Bell against The Company in the United States Court for the Northern District of New York by default on purported service made on its president in the State of New York, though said corporation admittedly had not complied with the laws of New York respecting foreign corporations (Tr. 71, 72). By further order of court (Tr. 145) the assets of The Company, consisting of certain mining claims described in the Complaint, were sold by the receiver to Black and Bell on March 20th, 1909, for the sum of \$40,000, two per cent of which is reported to have been in cash, as required by the order of sale (Tr. 155). Objections to the confirmation of the receiver's sale were filed by one Nicholas Rudebeck and one L. T. Reid, stockholders in The Company. These objections were overruled and the sale was confirmed on April

5th, 1909 (Tr. 165). No final report was filed by the receiver, nor were further proceedings of any kind had in said cause subsequent to the confirmation of said sale.

The complaint alleges that the entire proceedings leading up to the receiver's sale were in pursuance of a collusive and fraudulent understanding between Bell and Black. It is alleged in paragraph 16 of the Complaint (Tr. 11), admitted in paragraph 11 of Black's Answer (Tr. 32), and the record establishes that no less than three outside judges were called in by Black to sign various orders at different stages in the proceedings and, as above stated, the order appointing a permanent receiver and awarding judgment to Bell was made by a Judge *Pro Tempore* appointed by Black. The record also shows that of these different judges, apparently called pursuant to a definite plan to pass upon each different phase of the case, no judge participated a second time in any phase of the proceedings.

The foregoing statement is based on the admissions of the answers of Bell and Black (no appearance having been made in this suit on the part of The Company) and on the undisputed evidence adduced at the trial.

The bill of complaint prays, among other things, that Black and Bell "be declared to be trustees

for and on behalf of the said corporation and its stockholders, and be declared to hold all of the said property as trustees for the use and benefit of said corporation, for its *bona fide* creditors and stockholders." It also prays for the appointment of a receiver to wind up the affairs of The Company to the end that equity may be done between all parties.

In support of this prayer it was urged, among other contentions, on behalf of appellant in the lower court:

FIRST: That the Superior Court of Washington was without jurisdiction of the proceedings had in the foreclosure suit brought by Bell which resulted in the sale by a receiver of the property of The Company to Black and Bell:

(A) That The Company was never legally served with process.

(B) That the purported appearance on its behalf by Attorney D. W. Locke was unauthorized and fraudulent.

(C) That, the suit of Bell vs. The Company being primarily for the foreclosure of a mortgage, the court was powerless to authorize therein a sale of The Company's property by the receiver.

(D) That the receiver's sale was void, for the

further reason that he had not qualified by furnishing a bond as required by law.

SECOND: That since Black was a trustee and the general manager of The Company it was not permissible for him to hold adversely the property of The Company so purchased by him at a judicial sale.

These contentions were rejected by the trial court and in a written opinion, filed subsequent to the trial (Tr. 75), the court, specifically passing on the following points without referring to other questions involved, held:

FIRST: That Black was not precluded by reason of his relation with The Company, as trustee and general manager, from purchasing and holding adversely the property in question (Tr. 81).

SECOND: That there was no evidence of collusion between Black and Bell or that either of them exercised any undue or improper influence in any of the proceedings referred to in the complaint, and that the proceedings in the case of Bell vs. The Company leading up to the receiver's sale were regular and valid.

THIRD: That the order overruling the objections, filed by the stockholders, Rudebeck and Reid,

to the confirmation of the receiver's sale was *res judicata* of this suit (Tr. 85).

FIFTH: That the granting of the relief here sought would amount in effect to the setting aside of a judgment of the State Court, which relief a Federal Court would be powerless to grant.

SIXTH: That appellant was chargeable with laches and thereby precluded and barred from maintaining this suit.

A petition for a rehearing, filed by appellant, having been denied (Tr. 92), a final decree of dismissal was entered (Tr. 88). This appeal is prosecuted from said final decree.

ASSIGNMENTS OF ERROR.

Appellant has specified the following errors which he believes to have been committed by the trial court in rendering and entering the decree appealed from:

1. The court erred in holding that there was no evidence before it of any collusion between the defendants Black and Bell with relation to the conduct of the business of defendant company.

2. The court erred in holding that there was no evidence before it to justify the conclusion that either defendants Black or Bell exercised any un-

due influence of any character in any of the proceedings referred to in the complaint.

3. The court erred in holding that there was no evidence before it that any information with relation to the conditions or status of defendant company's property was at any time withheld from the plaintiff.

4. The court erred in holding that the plaintiff was guilty of laches and was thereby precluded and barred from maintaining this suit.

5. The court erred in holding that the action of the State Court in approving the claims filed with the receiver by defendants Black and Bell over the objection of a minority stockholder, other than the plaintiff herein, is *res judicata* of this suit.

6. The court erred in holding that the confirmation of the receiver's sale of the assets of the defendant company over the objection of a minority stockholder, other than the plaintiff herein, is *res adjudicata* of this suit.

7. The court erred in refusing to hold defendants Black and Bell, or either of them, as trustees of the property of defendant corporation bid in by them at the receiver's sale, for the use and benefit of said corporation and its stockholders.

8. The court erred in holding valid the pro-

ceedings had in the suit brought by defendant Frank L. Bell in the Superior Court of Washington for Snohomish County against the Sunset Copper Mining Company, wherein the assets of said company were sold by the receiver under order of court and purchased by defendants Frank L. Bell and W. W. Black.

9. The court erred in holding valid the receiver's sale of the assets of defendant corporation had in the foreclosure suit brought by defendant Bell in the Superior Court of Washington for Snohomish County.

10. The court erred in holding that the evidence introduced at the trial on behalf of complainant was insufficient to entitle complainant to any relief.

11. The court erred in holding that complainant's bill was without substantial equity and in dismissing the same and denying the relief therein prayed for.

12. The court erred in denying complainant's petition for a rehearing.

ARGUMENT.

I.

SUPERIOR COURT OF WASHINGTON
ACQUIRED NO JURISDICTION IN CASE
OF BELL VS. SUNSET COPPER MINING
COMPANY, HENCE PROCEEDING THERE-
IN A NULLITY.

It is familiar law that the jurisdiction of the court by which a judgment is rendered is open to inquiry in any collateral proceeding where such judgment is relied upon or called into question. If on such inquiry it be found that the court acted either without jurisdiction of the parties, the subject matter, or power to render the particular judgment, or that an apparent jurisdiction was conferred through fraud, the judgment, so rendered, will be held absolutely void and without force or effect.

Thompson vs. Whitman, 85 U. S. 457.

Webster vs. Reid, 11 Howard, 433.

Christman vs. Russell, 5 Wallace, 290.

Elliot vs. Peirsol, 1 Peters, 328, 340.

Johnson vs. North Star Lumber Co. (9
Cir.), 206 Fed. 175.

Foster vs. Milburn, 207 Fed. 175.

German Savings & Loan Society vs. Dormitzer, 192 U. S. 125.

(A) In discussing this question, we shall first devote ourselves to showing that no process was ever legally served on The Company in the proceeding brought by Bell wherein its property was sold to the appellees.

The record conclusively establishes, nor is it denied, that the only pretense of service of process had in said case was that made upon the president of The Company in the State of New York, in which state The Company was not doing business and with the laws of which, concerning foreign corporations, it had not complied (Tr. 119, 120, 121). Why service should have been attempted in this manner when Black, a trustee and the general manager of The Company, resided in Washington is not explained, but had the corporation had no agent within the State of Washington such service would have been void in any event, since Section 227 of Rem. & Bal. Codes and Statutes of Washington provides:

“Whenever any corporation, created by the laws of this state, or late territory of Washington, does not have an officer in this state upon whom legal service of process can be made, an action or proceeding against such corporation may be commenced in any county where the cause of action may arise, or said corporation may have property, and service may be made upon such corporation by depositing a copy of the summons, writ, or other process, in the office of the secretary of state.

which shall be taken, deemed and treated as personal service on such corporation."

It is entirely clear, from the above quoted statutes and on the most familiar principles of law, *Pennoyer vs. Neff*, 95 N. S. 714, that valid service on a Washington corporation cannot be acquired by the service of process on one of its officers sojourning in a sister state, even though such corporation has no officer in the State of Washington and has complied with the laws of the foreign state, which was not true in the present instance. Again the summons served in the present instance, which required an appearance within twenty instead of sixty days after service (Tr. 114) would be ineffective for any purpose when served outside the state, since the statutes of Washington provide a sixty-day period for appearances where service, in a proper case, is made outside of the state. Section 234 of Rem. & Bal. Codes and Statutes of Washington is as follows:

"Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state, except it shall require the defendant to appear and answer within sixty days after such personal service out of the state."

It will hardly be contended, we assume, that the acknowledgment of service endorsed on the summons by the president of The Company at the time same was served upon him, had or was intended to have any other purpose or effect than that of cumulative evidence in support of the return of the process server. Obviously, it could not be successfully contended that the president of a corporation would have authority, even though it were his intention to, by such an endorsement, waive objection to the service of a defective and insufficient summons, prescribing a time for appearance much shorter than that provided by statute, so as to permit the entry of a valid default judgment because of failure to appear within the time required by such summons. Especially would the officer of a corporation have no such power or authority where, as in this case, the service was made in a foreign state, on the opposite side of the continent, some three thousand miles beyond the jurisdiction of the court by which the judgment in question was entered.

The pretended service of process on the president of The Company in the State of New York was ineffectual for any purpose:

(1) Because the process served required an appearance within twenty days instead of sixty days as required by the statutes of Washington where service is made outside the state.

(2) Because the service of process on an officer of a Washington corporation, sojourning in a foreign state, is not permitted, under any circumstances, by the statutes of Washington above quoted.

These propositions are, it seems to us, too obvious to justify further argument.

(B) That Black, who had employed Attorney Sandidge to represent the plaintiff (Tr. 93), deemed it necessary to thereafter retain Attorney Locke to enter an appearance on behalf of the defendant company (Tr. 95) renders it evident that Black and Bell fully appreciated that no jurisdiction was conferred on the Washington court by the pretended service of process had on the president of The Company in the State of New York. Attorney Sandidge testified:

“My recollection is that Judge Black said the corporation had no defense to the foreclosure suit and I knew of no defense to the foreclosure or to the appointment of a receiver. There was no suggestion that a defense could be made, except what is made in the record itself.” (Tr. 94.)

Respecting the circumstances of his employment to represent Bell and the activities of Black on Bell's behalf, Attorney Sandidge further testified:

“The matter of my representing the plaintiff in said suit was first mentioned to me by

Judge W. W. Black. He told me that Mr. Bell contemplated such an action and that he had recommended to him that he employ me in the matter, and I think he told me that Mr. Bell would prepare and serve the complaint in New York and then forward it out here to Everett. This was subsequently done and I took charge of the case from that time on and looked after it as an attorney. I could not say without seeing the records just what papers I prepared in the case. Mr. Bell, according to my recollection came to my office and dictated some affidavits, and Judge Black dictated an affidavit that he made. During the course of the proceedings I talked the case over a number of times with Judge Black and generally discussed all steps of importance in the case with him. The defendant corporation was represented by W. D. Locke. My recollection is that there was no answer filed in the case and I do not recall that there was any issue made between Mr. Locke and myself. I think I discussed the claims filed by the creditors with Judge Black, and, while he said there were some claims that were not just, he did not personally care to object to them. My recollection is that there was no contest about any of the claims between myself and the attorney for the corporation.” (Tr. 94.)

Notwithstanding, Judge Black had stated that no defense was available in the foreclosure suit, and notwithstanding that after investigation he arrived, according to his testimony, at the same conclusion (Tr. 95), and notwithstanding the fact that no valid or sufficient service of process had

been made on The Company, Attorney Locke, on January 30th, 1909, on behalf of The Company, whose interests he claimed to represent, entered an appearance as attorney for The Company, at the same time stipulating for the appointment of a judge *pro tempore* before whom, he also agreed that the case might be finally heard at 10 o'clock A. M. of the same day. On the same paper and as part of the same document appears the signature of Judge Black approving the stipulation by Sandidge and Locke for the appointment of one F. E. Anderson to preside as judge *pro tempore* at said trial.

Concerning the selection and appointment of a judge *pro tempore* Section 40 of Rem. & Bal. Codes and Statutes of Washington provides:

“A case in the Superior Court of any county may be tried by a judge *pro tempore*, who must be a member of the bar, agreed upon in writing by the parties litigant or their attorneys of record.”

In the face of the above statute, the undisputed testimony of Attorney Locke shows that he acted not at all on his own judgment in the matter but deferred in the first instance entirely to the wishes of Judge Black in stipulating for the appointment of a judge *pro tempore*, so that said stipulation is a mere record of the desires of Black expressed through the signatures of the attorneys by which

it was signed. On this point Attorney Locke testified:

“I think I deferred to the wishes of my client, Judge Black, as to who the judge *pro tem.* should be. Judge Black suggested that Mr. Anderson be appointed and that was agreed upon.” (Tr. 96.)

Thus we have the trinity composed of W. W. Black, Judge of the Superior Court. John Sandidge, selected by Black as attorney for plaintiff, and D. W. Locke, likewise selected by Black as attorney for the defendant, appearing of record on a single document in a co-operative and concentrated effort to weave and perfect a judicial web around and about the intangible and alleged insolvent entity known as the Sunset Copper Mining Company, which would be sufficient to resist future attack from its stockholders and creditors. For the convenience of the court we reproduce said document herewith as same appears at page 13⁰ of the Tr., to-wit:

“In the Superior Court of the State of Washington, in and for the County of
Snohomish.

Frank L. Bell, Plaintiff,

vs.

Sunset Copper Mining Company, a Corporation,
Defendant.

No.

APPEARANCE AND STIPULATION.

I, D. W. Locke, do hereby enter by appearance as attorney for the above named defendant, having been duly authorized to appear as such attorney, and hereby consent that the above case may be tried on January 30th, 1909, at 10 o'clock A. M. of said day, or as soon thereafter as same may be reached.

D. W. LOCKE,

Attorney for Defendant.

It is hereby stipulated by and between the said plaintiff and the said defendant that the above entitled action may be tried before F. E. Anderson as judge *pro tempore*, and that said case may be tried before F. E. Anderson as judge *pro tem.* on the 30th day of January, 1909, at the county court house in Everett, Washington, at ten o'clock A. M. of said day or as soon thereafter as same can be reached.

JOHN SANDIDGE,

Attorney for Plaintiff.

D. W. LOCKE,

Attorney for Defendant.

The foregoing stipulation that F. E. Anderson shall try the above cause as judge *pro tem.*, is hereby approved.

W. W. BLACK, Judge.

Filed: Jan. 30th, 1909.

JOHN R. DALLY, County Clerk."

Here then is presented the remarkable spectacle of what is paraded as a judicial proceeding before a judge *pro tempore* selected, not by the attorneys for the respective parties, as required by statute, but by the regular presiding judge of said court who had theretofore selected and retained the attorney appearing for the plaintiff and who had likewise selected and retained an attorney to appear for the defendant for the sole purpose of conferring jurisdiction on the court, said regular judge being himself the local legal representative and general manager of the defending corporation and the subsequent beneficiary of the proceedings had before said judge *pro tempore*. Nor is this all, but the product of this thoughtfully devised and carefully constructed judicial system was the appointment without opposition as receiver of the defendant corporation of the man who had also been selected for that position by the same master mind, W. W. Black, Judge of the Superior Court of Washington for Snohomish County and a trustee and the general manager of the defendant, Sunset Copper Mining Company. As to how he came to be appointed receiver Fogarty testified as follows:

“The first suggestion of my becoming the receiver was made to me by Judge Black, who asked me if I would serve if appointed and I told him I would.” (Tr. 97.)

It should also be borne in mind that after thus connecting up the record and conferring apparent jurisdiction on the court to enter what was obviously thought to be an unassailable judgment, Attorney Locke dropped entirely from view and took no further part in the proceedings. On this point he testified:

“Q. Examine page 18 of Plaintiff’s Exhibit B which I now hand you, being a transcript of the records and files in the case of Bell against Sunset Copper Mining Company in Snohomish County. Have you read it?

A. Yes, I have read it.

Q. Now, is it not true that the appearance indicated on this page 18 is the only appearance you ever made in the case?

A. I only made one appearance in the case.” (Tr. 96.)

Since in the absence of a voluntary appearance, the Superior Court of Washington had no jurisdiction in the case of Bell versus The Company, we confidently assert that no jurisdiction was conferred through the appearance made by an attorney under the circumstances disclosed by the record in that case. It certainly cannot be successfully claimed that it was within the scope of the duties, either actual or implied, of Black as an officer of The Company, to authorize the entry of a voluntary appearance in a law suit against The Company, to which he claims there was no defense, for the single purpose of conferring jur-

isdiction in order that the corporation might be deprived of its entire assets for the advantage of himself and his co-defendant Bell. While it might, in a proper case, be within the province of the managing agent of a corporation to employ counsel to represent and defend such corporation in litigation actually pending, we unreservedly assert that no case can be found in the books justifying the conduct of Black in the present instance, nor holding jurisdiction to have been conferred through such a course of procedure, certainly not as against a purchaser with notice. Instead of having acted for the protection of the rights and interest of his corporation, which is the measure and limit of the authority of an agent to act in any situation, Black, by authorizing an appearance for the purpose of conferring jurisdiction in a suit against which he did not propose to defend, thereby voluntarily sacrificed rather than protected whatever rights the corporation might have had in the premises.

As just stated, the situation might assume a different aspect were the defendants in the present suit innocent purchasers, and a plausible argument might be made in favor of the jurisdiction which the Snohomish County Court assumed to exercise, but since, instead of being a purchaser without notice, we find the plaintiff in that suit, together with Black, who not only directed the entry of

an appearance under the circumstances related, but who, as the evidence shows, also selected the attorney for the plaintiff, now asserting ownership of the property, as purchasers thereof at a judicial sale had in the proceedings, conceived, fostered and propagated by them in the manner described. Collusion seems to us, therefore, to be the only term by which such conduct can be properly described and it would, it further seems to us, be a travesty on the law and on justice to now permit the respondents, through any technical form, to retain the fruits of such collusion.

Although in some instances, where the proceedings are entirely regular on their face and in the absence of any inducement to unfairness, persons occupying a fiduciary or trust relation may be permitted to purchase the trust property at a judicial sale, yet such purchase in itself is calculated to throw doubt on the fairness of the sale and in the language of the Court of Appeals of Kentucky, quoted with approval by the United States Supreme Court in *Schroeders vs. Young*, 161 U. S. 340:

“Public policy and the analogies of the law require that they should be considered *per se* as in the twilight between legal fraud and fairness and should be deemed fraudulent or in trust for the debtor upon slight additional facts.”

It is so universally held that fraud, practiced in the act of obtaining or procuring the entry of a judgment, entirely destroys its validity and renders it subject to collateral attack that the citation of authority in support of the proposition would not be in order. This principle is recognized, indeed, in the closing paragraph of the opinion of the trial court (Tr. 86).

It is also very generally held that the unauthorized appearance of an attorney, whereby an apparent jurisdiction is conferred where none would otherwise exist, constitutes a fraud which will render null and void, a judgment thereby obtained, in any court where such judgment may be called in question.

“The appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel, under such circumstances, to the prejudice of a party, subjects the counsel to damages, but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle of law which affords him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity and consequently did not authorize the seizure and sale of his property.”

Shelton vs. Tiffin, 6 Howard, 162, 186.

“A judgment against a defendant upon an

appearance for him by an attorney of record does not preclude such defendant from showing, in a subsequent proceeding, that the appearance was not authorized.”

Hatch vs. Ferguson, 57 Fed, 959, 971.

“Ordinarily the authority of an attorney to appear for the party, whom he professes by the record to represent, is presumed, but such presumption may be overcome by any evidence extrinsic as well as intrinsic.”

Dormitzer vs. German Savings & Loan Society, 23 Wash. 195.

The decision of the Washington Supreme Court from which the above is quoted and by which a decree of divorce was held in a collateral proceeding to be of no effect because rendered on an unauthorized appearance of an attorney for the defendant, was subsequently affirmed on writ of error by the Supreme Court of the United States.

German Savings & Loan Society vs. Dormitzer, 192 U. S. 125.

To the same effect:

Mills vs. Scott, 43 Fed. 452.

Graham vs. Spencer, 14 Fed. 603.

First National Bank , Etc., vs. Cunningham,
48 Fed. 510.

Anderson vs. Hawhe, 3 N. E. 566.

Chicago, Etc., R. Co. vs. Hitchcock County,
84 N. W. 97.

National Exchange Bank vs. Wiley, 92 N.
W. 582.

Hess vs. Cole, 23 N. J. L. 116.

(C) The record shows (Tr. 120, 121) that on November 30, 1908, in connection with and at the same time of the pretended service of summons, a notice was served on the president of The Company in the State of New York to the effect that at the hour of 9:30 o'clock A. M. on the 9th day of December, 1908, application would be made to the Superior Court of the State of Washington, in and for the County of Snohomish, in the suit brought against it by Frank L. Bell, for the appointment of a receiver. The record, however, does not disclose that any proceedings were had on the date indicated, but on the following day, December 10, 1908, an order was entered, in said cause, appointing John B. Fogarty receiver for The Company and fixing his bond at \$1,000. This order (Tr. 125) recites:

“And it appearing from the files and records herein that due and legal notice of this application, together with a true copy of the summons and complaint herein and of the affidavit used upon this hearing, have been duly served upon the defendant, the Sunset Copper Mining Company, and that no answer, demurrer or objections to this application have

been filed or made''; a receiver is appointed, etc.

Hence, we contend that, since no notice is to be found in the records in said cause that an application for the appointment of a receiver would be made on December 10, 1908, the court order in question is void and carries on its face conclusive evidence of its infirmity, since it is the established rule that where jurisdictional facts are stated in a judgment, others will not be presumed, and if those stated are not supported by the record the court will be held to have acted without jurisdiction.

Galpin vs. Page, 18 Wallace, 350.

Johnson vs. North Star Lumber Co. (9 Cir.), 206 Fed. 624, 629.

Foster vs. Milburn, 202 Fed. 175.

Without the entry of any other or further order of court, said Fogarty proceeded to qualify as temporary receiver and filed a bond in the sum of \$1,000, conditioned for the faithful performance of his duties as temporary receiver as required by the order of his appointment (Tr. 127). No further court proceedings were had until January 30, 1909, when, upon the appearance of W. D. Locke as attorney for the defendant company, heretofore discussed, a purported final decree was entered awarding judgment to Bell for the sum of

\$37,501.75 with interest and costs, appointing said John B. Fogarty as permanent receiver, and further ordering:

“That the bond heretofore given herein by the said John B. Fogarty as temporary receiver may be continued and remain in force as his bond, above required, as permanent receiver.” (Tr. 132.)

It is our contention that the order of December 10, 1908, appointing a temporary receiver, was absolutely void for two jurisdictional reasons:

1. Because the only notice pretended to have been served or given that an application for the appointment of a receiver would be made, was served outside and beyond the jurisdiction of the Washington court in the State of New York, which, for the reasons heretofore pointed out in connection with the pretended service of summons, was ineffectual for any purpose.

2. For the further reason that even though it should be conceded, for the sake of argument, that a notice of such an application, served in the State of New York, would be sufficient to enable a Washington court to enter a valid order or decree thereon, yet, as above pointed out, the order appointing a temporary receiver was not made until the day following the date indicated in the notice as the time in which such application would

be made. That is, the notice was to the effect that application would be made on December 9th notwithstanding which and without any proceedings on the date indicated the hearing was had and the order was entered on the following day, December 10, 1908.

If correct in either of these contentions, then it follows that all proceedings based upon or connected with said order of December 10, 1908, including the bond of the temporary receiver, were nullities. If the bond given by the temporary receiver was void for that purpose, because based on a void order, then it was void for all purposes, and wholly incapable of being rendered effectual as a valid bond for the permanent receiver by the subsequent order of court entered on January 30, 1909, above quoted.

Again the bond of the temporary receiver was given and conditioned for a specific purpose and should it be conceded that the order, appointing a temporary receiver and the bond given in conformity therewith were valid, yet said bond became *functus officio* when that purpose had been served. Hence, the court was without jurisdiction or authority to extend or continue the obligation of the surety on said bond or to render such surety responsible for the faithful performance of the permanent receiver and the court order by which this was attempted to be done was for this addi-

tional reason a mere nullity. It must, therefore, be held that the receiver assumed to and did act as such in violation of the laws of the state and in like violation of the intention of the court by which he was appointed.

It follows, therefore, that the permanent receiver never qualified by furnishing a bond as required by Section 742 of Rem. & Bal. Codes of Washington, which provides:

“Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties approved by the court, execute a bond to such person as the court may direct, conditioned that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.”

The decisions are practically unanimous to the effect that where by statute or order of court a receiver, executor, guardian or other similar officer is required to furnish a bond for the faithful discharge of his duties, he is powerless to do any legal act in connection with the estate over which he has been appointed until he has complied with such requirement. The question here presented was before this court in the case of Hatch vs. Ferguson, 68 Fed. 43, wherein it was held that a partition sale of the property of a minor, represented by a guardian who had not furnished a bond in compliance with the statutes of Washington and

the order of the court by which he was appointed, was absolutely void. From the opinion in that case by Judge Gilbert, thoroughly reviewing the authorities, we quote as follows:

“The probate court, while it is a court of record, with general jurisdiction, acts nevertheless, in the matter of appointing guardians, under a specific grant of power, and exercises a special jurisdiction defined by statute. If the facts do not exist which authorize the action of the court, its action so far is a nullity. * * * Ferguson gave no bond, but proceeded to act as the guardian of the estate of the minor children, and continued so to act until the commencement of the present suit. * * * The questions arise whether he was such guardian, and whether the partition decree and sale are void on account of his failure to give a guardian’s bond. * * * Considering the language of the Washington statute, and the purpose which was intended to be subserved by the provision requiring a bond of the guardian before he should assume the duties of his office, we think it the better doctrine to hold that the statute is mandatory, and that the execution of a bond is made a necessary prerequisite to the appointment of a guardian. * * * Notwithstanding the judgment of the probate court appointing the guardian, and the judgment of the Superior Court decreeing and confirming the sale, his acts are void, and may be so declared in any court having jurisdiction of the subject-matter and the parties to the suit. To hold that such defects may be taken advantage of only in direct proceedings is to afford but little protection to the ward whose property

is being administered. * * * The failure to give a bond, which is by statute made necessary to the creation of the office of guardian, may be considered a jurisdictional defect, which would prevent the nominated guardian from assuming the duties of his office, and the probate court from acquiring, through such guardianship, the control of the ward's estate."

In another federal case, *Ritchie vs. Sayers*, 100 Fed. 520, a sale of real estate on attachment, made in the absence of a bond required by statute as a prerequisite, was held to be absolutely void and to confer no title on the purchaser. In the course of its opinion the court said:

"But it is claimed that the circuit court of McDowell county had full and complete jurisdiction over this matter and that that jurisdiction being exercised, it cannot be collaterally attacked. * * * In this case there was an attempt to sue out an attachment, not in accordance with the terms and provision of the statute, but strictly in defiance of the statute. * * * No bond was given, as required by the statute, before the sale was made. The proceedings had under the statute were in derogation of the rights of the party at common law, and it is a well settled and familiar principle that, where a proceeding is founded upon a statute which deprives a party of his common-law rights, every condition or requirement of the statute must be fulfilled and strictly complied with. What protection has a non-resident who owns real estate in our state, if he has no notice of a suit that may be brought against him, and

if his property is proceeded against for the purpose of collecting either a rightful or an illegal claim, unless the conditions which are precedent to the exercising of these powers which confer jurisdiction upon the courts are complied with? The courts all hold that, where proceedings are instituted under statutes of this character, a failure to comply with the provisions of the statute should be condemned, and the sale of property under such circumstances should be set aside. * * * This whole proceeding was illegal and void, commencing with the decree of the sale, for the reason that such sale was absolutely prohibited until bond was given."

The Supreme Court of California, in the case of *Davilia v. Heath*, 109 Pac. 893, held that the failure of the plaintiff in a suit for the appointment of a receiver to file an undertaking, as required by the statutes of California, rendered the appointment of a receiver in such suit absolutely void, though the receiver himself had filed a bond in conformity with the statute and the order of his appointment. This holding was affirmed by the Supreme Court of California, in the more recent case of *Biby v. Dieter*, 113 Pac. 874, in which case it was further held that the appointment of a receiver, void because of the failure of the plaintiff to furnish the bond required by statute, could not be validated by any subsequent proceeding.

That a receiver has no title to the property nor any power or authority to act until he has given

the bond required of him was held by the Supreme Court of West Virginia in *Crumlisher's Adm'r. v. Shenandoah Valley R. Co.*, 22 S. E. 91. See Syllabus 8 and page 104 of the opinion. To the same effect:

Wadsworth v. Connell, 104 Ill. 369;
Stewart v. Bailey, 28 Mich. 251;
Ryder v. Flanders, 30 Mich. 336;
Pryor v. Downey, 50 Cal. 338;
Gwynn v. McCauley, 32 Ark. 97;
McKeever v. Ball, 71 Ind. 398;
Wuesthoff v. Insurance Co., 107 N. Y. 580,
14 N. E. 811.

It would seem that no argument should be necessary to demonstrate that under the rule announced in the above cases the receiver's sale in the case at bar must, regardless of all other defects, be held void because of his failure to execute a bond as required by the statutes of Washington.

II.

THE SUPERIOR COURT OF WASHINGTON WAS POWERLESS IN THE FORECLOSURE SUIT OF BELL VS. THE COMPANY TO LEGALLY AUTHORIZE THE SALE OF THE ASSETS OF THE COMPANY BY A RECEIVER.

The complaint in the case of Bell vs. The Com-

pany in the Superior Court of Washington for Snohomish County shows that it was based upon the two mortgages described therein, and that it was brought for the foreclosure of said mortgages against the mining claims of The Company described therein (Tr. 115). While said complaint prayed for the appointment of a receiver to raise "money for the doing of the necessary work in order to hold said mining claims and to watch and care for said property, etc.," said complaint also prayed "*for judgment against said Company foreclosing said mortgages as provided by law.*" (Italics ours.) In other words the complaint prayed for the appointment of a receiver *pendente lite* to preserve and protect the property pending the foreclosure proceedings and until the mortgaged property could be sold in the regular course of foreclosure, should the demands of the mortgagee be not sooner or otherwise satisfied. We now propose to show that only in cases of emergency, to care for and protect the property being foreclosed against pending such proceedings and until such property can be sold in the orderly course of foreclosure, can a receiver be appointed in a foreclosure suit under the laws of Washington, and this is the ultimate measure and limit of the authority of a receiver so appointed; that without regard to the questions heretofore urged against the legality of said proceedings, the Superior Court of Washington was powerless to au-

thorize the receiver, appointed in said foreclosure suit, to sell the mortgaged property; that said Superior Court exceeded its jurisdiction in assuming to authorize such sale by the receiver and that the order so issued was for that reason void.

Had Bell not abandoned his foreclosure suit in favor of a receiver's sale The Company, under Sections 594 and 596 of Rem. & Bal. Codes of Washington, would have had one year within which to redeem from the mortgage sale, whereas no such right exists as against a receiver's sale. Of this right, which became a matter of contract at the time of the execution of said mortgages, the court was powerless to deprive The Company.

This question was set at rest in the State of Washington by the decision of the State Supreme Court in the case of *Norfer v. Busby*, 19 Wash. 450, where it is held that the early territorial statute authorizing the appointment of receiver in a foreclosure suit, having been repealed, the court was without power to make such appointment, since a mortgage in this state is only an incident to and security for the payment of a debt, the title to the property at all times remaining in the mortgagor with the right of redemption in case of foreclosure and sale. In other words, it being the policy of the state, as expressed by legislative enactment, to allow a period for redemp-

tion, an order of court purporting to authorize the sale by a receiver, thereby precluding the right of redemption, is absolutely void.

The concluding sentence of the Busby case, which has only been modified by subsequent decisions to the extent of pointing out when and under what circumstances a receiver may be appointed to take charge of rents, issues and profits and to prevent waste, etc., *pendente lite*, is as follows:

“When the mortgage is executed, the valuation of the security is made by the respective parties to the contract, and it is also executed in view of the public policy of the state expressed by the statute, and it is evident that the statute cannot be evaded by taking the most valuable incidents of possession from the mortgagor under the guise of rents and profits.”

In the case of Union Mutual, Etc., Ins. Co. vs. Union Mills Co., 37 Fed. 286, it was held, with a view to the statutes and laws of Michigan, that since in that state the mortgagor had the right of possession pending a foreclosure suit and until confirmation of the sale, the court was without power to appoint a receiver. We quote from the syllabus in that case as follows:

“How. St. Mich., Sec. 7847, taking from the mortgagee the right to possession until foreclosure sale is confirmed, and the holding in

Wagar v. Stone, 36 Mich. 364, that this statute secures to the mortgagor the rents and profits pending foreclosure, constitute a rule governing substantial rights, and not mere matters of practice, *and deprive the federal courts sitting in that state of the power to appoint a receiver of the rents and profits on the ground that the security is inadequate.*”

The following excerpt from Wagar v. Stone, 36 Mich. 364, was quoted with approval in Norfer v. Busby, to-wit:

“The mortgagor being entitled under the statute to the possession and consequently to the rents and profits of the mortgaged premises until such time as his title is divested by a perfected foreclosure, it is not competent to cut short his rights in this regard by means of a receiver appointed in the foreclosure suit.”

In the later Michigan case of Hazeltine v. Granger, 7 N. W. 74, also cited in the Busby case, discussing the power of the court to appoint a receiver under a special stipulation therefor contained in the mortgage, it is said:

“We think the court had no power to grant the order, which is unprecedented even under the old practice, both for requiring no security and for having no basis of facts to authorize it. The courts in equity have no power to appoint receivers except ‘when such appointment is allowed by law.’”

The purpose, force and effect of an Oregon statute concerning the rights of mortgagors in mortgaged property, both before and during foreclosure proceedings, similar in terms and effect to the Washington statute, was considered by the Supreme Court of the United States in *Teal v. Walker*, 111 U. S. 242, 28 Law Ed. 415, and in holding unenforcible and void a provision in a mortgage intended to defeat the purpose of the statute, it was said:

“The case of the defendant in error cannot be aided by the stipulation in the defeasance of August 19, 1874, exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to Hewett, the trustee, the possession of the mortgaged premises. That contract was contrary to the public policy of the State of Oregon, as expressed in the statute just cited, and was not binding on the mortgagor or his vendee, and although not expressly prohibited by law, yet, like all contracts opposed to the public policy of the state, it cannot be enforced.”

Since, therefore, a mortgagor in the State of Washington retains title to the mortgaged property, coupled with the right of redemption under a statute held to be declaratory of a public policy, which cannot even be bartered away by contract and which, according to the decisions, it is beyond the “power” of the courts to take away, we respectfully contend that the sale of the Sunset

properties by a receiver, appointed in a foreclosure suit, was not merely voidable or irregular, but regardless of all other defects was absolutely void.

While we have found no case where the effect or legality of a sale by a receiver in a foreclosure suit has been questioned on these grounds or under statutes similar to those controlling in this suit, the principles contended for are fully recognized in the above authorities and the courts are unanimous in holding that an order or decree rendered beyond and in excess of the power of jurisdiction of the court is absolutely void and subject to collateral attack, even though the court by which it was entered had jurisdiction of the parties and the subject-matter of the suit.

“There is a tendency in the latest decisions of the United States to hold that jurisdiction is not only the power to hear and determine but also the power to render the particular judgment entered in the particular case.”

12 *Enc. of Law* (Old Ed.), 246, 247, quoted with approval in *Watkins Land-Mort. Co. v. Mullen*, 54 Pac. 921.

Holding the judgment there in question subject to collateral attack, the Supreme Court of the United States in the case of *U. S. v. Walker*, 109 U. S. 258, 27 Law Ed. 927, after a thorough discussion of the question, in the concluding paragraph of the opinion said:

“In this case the statute gave the court power, on the removal of an executor or administrator, to order the assets of the decedent, which might remain unadministered, to be delivered to the administrator *debonis non*. The court made an order directing the delivery of the proceeds of administered assets. This was beyond the power conferred by the statute, and not within the jurisdiction of the court. The order was, therefore, void.”

This doctrine was reannounced and affirmed in the case of Neilson, Petitioner, 139 U. S. 176, 33 Law Ed. 118, and Cuddy, Petitioner, 131 U. S. 280, 27 Law Ed. 154.

In the case of *Murray v. American Surety Co. of New York*, 70 Fed. 341, the Court of Appeals for the Ninth Circuit sustained a collateral attack on the appointment of a receiver for an insolvent bank in a proceeding instituted under a California statute and holding that a receiver so attempted to be appointed was without any power as such, among other things said:

“The fact that there are other provisions of the Code of California which authorize the court, in other proceedings, to appoint a receiver, cannot be said to authorize the court to appoint a receiver in proceedings instituted under the provisions of Section 11 of the Bank Commissioners’ Act. Courts do not make the laws. They interpret them. If there is no warrant in the statute for the doing of an act, courts cannot supply the defect. There is nothing in the contention of counsel for

plaintiff in error that will 'justify us in interpolating into the statute something that the legislature has omitted.' *People's Sav. Bank v. Superior Court of San Francisco*, 103 Cal. 33, 36 Pac. 1051. In whatever light this question may be viewed, we are brought face to face with the unquestioned rule of law that in all special statutory proceedings the measure of the court's power is the statute itself. See authorities before cited: *Smith v. Westfield*, 88 Cal. 374, 26 Pac. 206; *East Tennessee, V. & G. R. Co. v. Southern Tel. Co.*, 112 U. S. 306, 5 Sup. Ct. 168; *Jur.*, Sec. 70; *High, Rec.*, Sec. 43. Whatever steps are provided for by the statute may be taken by the court, and, no matter how irregular or erroneous its action may be in regard thereto, it is conclusive until reversed upon appeal, and cannot be collaterally assailed. *Dowell v. Appelgate*, 152 U. S. 327, 240, 14 Sup. Ct. 611, and authorities there cited. But the judgment of a court having no jurisdiction of the subject-matter or the parties, or the exercise of a power by the court not authorized by the statute in purely statutory proceedings, is utterly null and void, and may be collaterally assailed."

The Circuit Court of Appeals for the Ninth Circuit in the case of *J. P. Jorgenson Co. v. Rapp*, 157 Fed. 732, in a suit brought to restrain the en-forcement of a judgment awarding relief in excess of and different from that demanded by the pleadings, said:

"It follows that, as the judgment was not based upon the pleadings or issues in the case and the judgment was contrary to the findings

of fact, the court had no jurisdiction to make and enter the judgment it did in this action. In Black on Judgments the void character of such a judgment is discussed with that author's clearness, in Sections 184, 241, and 242. In the last section the author says:

'Besides jurisdiction of the person of the defendant and of the general subject-matter of the action, it is necessary to the validity of a judgment that the court should have had jurisdiction of the precise question which its judgment assumes to decide, or of the particular remedy or relief which it assumes to grant.' " (Italics ours.)

To the same effect:

Hatch v. Ferguson, 68 Fed. 43 Ninth Circuit), heretofore quoted.

In *Seamster v. Blackstock*, 2 S. E. 36, a widow brought suit for the sole purpose of having dower assigned to her out of the estate of her deceased husband. The court, in addition to awarding dower, decreed a sale of the remainder of the lands. In an action of ejectment constituting a collateral attack, it was held that the court, having exceeded its jurisdiction, the sale was absolutely void and of no effect.

The doctrine announced by the Supreme Court of West Virginia in the *Seamster* case has been reiterated and amplified by the same court in the more recent cases of *Heback v. Miller*, 29 S. E. 1014, and *Waldron v. Harvey*, 46 S. E. 603.

In *Watson Land-Mort. Co. v. Mullen*, 54 Pac. 921, the sale of a homestead by an administrator, under authority of court for the payment of certain debts from which said lands were exempt, was held to be absolutely void because of want of power in the court to order or confirm such sale.

In the case of *Sache v. Gillette*, 112 N. W. 386, 387, it is said:

“The mere fact that the court has jurisdiction of the subject-matter of an action before it does not justify an exercise of a power not authorized by law, or a grant of relief to one of the parties the law declares shall not be granted. If the court may do so, under the guise of ‘jurisdiction of the subject-matter,’ then it may commit all sorts of depredations upon the rights of parties, particularly in default cases. * * * Though it has general jurisdiction over the subject-matter, for instance, of actions to foreclose mortgages, to quiet title to real property, or for damages for personal injuries, its power to decide and determine matters in dispute between parties in a given action is limited to those questions which are brought before it by pleadings. * * * When the court goes beyond and outside of the issues made by the pleadings, and in the absence of one of the parties determines property rights against him which he has not submitted to it, the authority of the court is exceeded, even though it had jurisdiction of the general subject of the matters adjudicated. Such a departure cannot be held a mere irregularity.

Although every exercise of power not pos-

sessed by a court will not necessarily render its action a nullity, it is clear that every final act, in the form of a judgment or decree, granting relief the law declares shall not be granted is void, even when collaterally called in question."

In the case of Knickerbocker Trust Co. v. Oneonta C. & R. S. Ry., 94 N. E. 871, it was held by the Appeals Court of New York that a court of equity had no power to authorize the issuance of receiver's certificates and constitute them a first and prior lien against the property of an insolvent corporation for any purpose other than for the care, maintenance and preservation of the property of such corporation and that certificates issued under order of court for the benefit and advantage of particular claimants or creditors, though same had been issued to and paid for by innocent purchasers, were absolutely void and subject to collateral attack. Speaking through Chief Justice Cullen, the court said:

"He (the certificate holder) relies on the general rule, often declared, that a judgment or decree of a court which has jurisdiction of the person and subject-matter is binding until reversed, and cannot be attacked collaterally. This general principle may be conceded, and I shall assume, for the argument, that the powers of the court in a sequestration action are as great as those possessed by it in an ordinary equity action, but the general rule quoted is subject to this qualification, * * *

that the court must have power to render the judgment made by it.

The power to issue receiver's certificates paramount to the liens of strangers to the suit is of a strictly limited nature, and the theory on which the existence of power at all is based is clearly stated in two decisions of the United States Supreme Court. * * *

The order made in this case, however, showed on its face that the certificates were to be issued for no such object, but to prevent the foreclosure and loss to the stockholders and creditors of the railroad. Probably payment of the defaulted interest and avoidance of a foreclosure would benefit the stockholders and creditors of the company, and so also would the issue of certificates, the proceeds thereof to be paid to creditors, benefit the creditors; but neither would benefit or enhance the value of the railroad or save it from depreciation to the extent of a dollar, and the railroad was the only *res* in court. Nor would it contribute at all to the proper operation of the railroad, the thing in which the public was interested. The effect of the order was simply to pay bondholders by appropriating against their will part of their own property for the purpose.

The order of the court was therefore not only erroneous, but void as in excess of its power; and, though the court in granting the order necessarily decided that it was within its powers, still the order may be attacked collaterally." (Italics ours.)

To the same effect, 25 Cyc. 684, 1074, and 24 Cyc. 72.

While the complainant in the Snohomish County case prayed the appointment of a receiver, the action was, nevertheless, for the foreclosure of a mortgage, and under the statutes and established law of this state, as declared by its highest court, the Superior Court had no power or jurisdiction to depart from the orderly and established practice in foreclosure proceedings and was likewise without power or jurisdiction to authorize a sale of said property by a receiver. The fact that such relief may have been demanded in the complaint did not confer any additional authority on the Superior Court, since the legal aspects of the situation were in no way changed nor the power of the court enlarged by a demand for relief, which the court could not legally grant.

III.

THE PROCEEDINGS LEADING UP TO AND INCLUDING THE RECEIVER'S SALE OF THE ASSETS OF THE COMPANY BEING VOID, THE SUBSEQUENT ORDER OF CONFIRMATION ENTERED BY THE SUPERIOR COURT IN SAID PROCEEDINGS WAS INEFFECTUAL TO RENDER VALID THAT WHICH WAS NULL AND VOID FROM THE BEGINNING AND IS NOT RES JUDICATA OF THIS SUIT.

That a void judicial sale cannot be rendered

valid or legal by a subsequent confirmation is the universal holding of the courts.

In the case of *Shriver's Lessee v. Lynn, et al.*, 2nd How. 43, 11 Law Edition, 172, it is said:

"The sale being without authority, the ratification of it by the court must be considered as having been given inadvertently. If given deliberately and on a full examination of all the facts, still it must be regarded as an unauthorized proceeding. There was no case before the court—nothing on which its judgment could rest."

The Supreme Court of the United States in the case of *Gaines v. New Orleans*, 73 U. S. 642, 18 Law Ed. 950, affirmed the rule just stated, saying:

"A kindred defense to this is, that the probate court of New Orleans, in 1841, duly approved of the sales made by Relf and Chew as executors, and that this homologation is binding upon the complaint. * * * If it were true the accounts were duly homologated, these defendants are not benefited by it, because the probate court could not by a subsequent order give validity to sales made by executors, which were null and void by the law of the state when they were made."

In *Lemaster v. Keeler*, 123 U. S. 376, 31 Law Ed. 238, said rule is again reiterated with emphasis by Justice Field in the concluding paragraph of the opinion where it is said:

"The confirmation of the sale by the order

of the court did not cure the invalidity of the execution upon which it was made. The extension of the judgment against Young, so as to embrace the sureties, being a void proceeding, no subsequent action upon the sale could give it validity. A confirmation of a sale may cure mere irregularities not affecting its fairness, but not an infirmity growing out of the nullity of the judgment under which it was had."

The rule stated has been recognized and applied by the Supreme Court for the State of Washington in no uncertain fashion. In the case of *Vietzen v. Otis*, 46 Wash. 402, 407, speaking through Justice Rudkin, now of the Federal Bench, the court said:

"Was the defect in the sale cured by the direction contained in the decree of foreclosure that it should be so made, or by the subsequent order of confirmation? We think not. * * * Under the express provision of our statute and numerous decisions of this court, irregularities in the manner of conducting sales are the only defects cured by confirmation. We hold, therefore, that the sale in question was utterly void in its inception, and remains so notwithstanding the direction in the decree of foreclosure and the order of confirmation."

On this point *Vietzen v. Otis* was affirmed by the same court in the later case of *McLiesh v. Ball*, 58 Wash. 690.

Should this court adjudge void the sale of the

assets of The Company and the confirmation thereof, then must fall, without further argument, the holding of the lower court that the order of confirmation entered over the objection of certain stockholders, not including this appellant, is *res judicata* of this suit and estops appellant from further attacking or questioning the validity of those proceedings. In other words, since a void judgment is ineffectual for any purpose, inadmissible in evidence and not in fact a judgment at all, it follows that no estoppel can arise against this appellant from the action of other stockholders in presenting objections with a view to preventing the court from further encumbering the record with void proceedings. Under the above cited authorities the order of confirmation did not cure the jurisdictional defects in the prior proceedings and was itself void, hence, the attempt of certain stockholders to prevent the error subsequently committed cannot prevent an attack upon nor infuse legality in that which was void from the beginning.

Again, it is obvious that many elements of the cause of action set up in the bill of complaint herein were not and could not have been put at issue by objections to the confirmation of said sale. For illustration, the contention that a trustee of a corporation cannot at a judicial sale, under the circumstances here presented, become the purchaser of the assets of his corporation and hold

them adversely to the corporation for his own individual use and benefit, could not possibly have been presented at that time since the presumption was that Black would be faithful to his trust and that he had purchased for the use and benefit of the corporation whose best interests it was his duty to protect. Furthermore, the confirmation was subsequent in time to the overruling of said objections and with the confirmation of the sale an entirely new element was injected into the controversy, and on the assertion by the purchaser of personal ownership the rights of The Company and its stockholders were placed in jeopardy from an entirely new quarter.

“A judgment is not and cannot be an estoppel as to facts which did not occur until after the judgment was rendered and which were not involved in the suit in which it was rendered.”

23 *Cyc.* 1315.

Stated in another way, it is sought in this action to hold appellees as trustees of a constructive trust:

First: Because all the proceedings leading up to and including the confirmation of the sale by virtue of which they became the paper owner of said assets are absolutely void and without force or effect for any purpose; and,

Second: That regardless of the validity of said court proceedings, Black as trustee and general

manager was and is incapable, under the circumstances here disclosed, of purchasing and holding said assets adversely to The Company, and that because of the obvious collusion between Black and Bell whereby the sale was brought about, Bell must also be held to the same standard of accountability.

IV.

BLACK BEING A TRUSTEE AND THE GENERAL MANAGER OCCUPIED A FIDUCIARY RELATION PREVENTING HIM FROM PURCHASING, AT THE RECEIVER'S SALE, AND HOLDING ADVERSELY THE ASSETS OF THE COMPANY AND BELL IN CONSEQUENCE OF HIS CO-OPERATION AND OBVIOUS UNDERSTANDING WITH BLACK IS SUBJECT TO THE SAME RULE.

That a trustee and managing officer of a corporation occupies a fiduciary relation and is for such corporation a trustee in fact, is too well established to justify discussion. It is also well established that because of such trust relation he is required to have in mind at all times the promotion of the best interests of his *cestuis que trust*, the corporation and its stockholders. He is strictly forbidden to profit at the expense of the corporation and, though he may contract with the corporation when clearly for its best interests, he

cannot take advantage of a financial embarrassment of the concern whose interests he is required to promote by becoming a purchaser on his own account of the assets of such corporation at a judicial sale brought about in consequence of the unprosperous and tangled condition of its business affairs. This general doctrine is universal and the failure of its application the infrequent exception.

Concerning the status of a trustee of a corporation under the laws of Washington, the Supreme Court of this state in the case of *Parsons v. Tacoma Smelting Co.*, 25 Wash. 492, said:

“The ordinary obligations attending trust relations attach to the trustee of a corporation. The policy of the law forbids the trustee to assume a double function where there are adverse interests considered.”

The case of *Coombs v. Barker* (Mon.), 79 Pac. 1, presents a state of facts similar in many respects to those involved in the case at bar and in the course of a lengthy and an exceptionally well considered opinion, it is said:

“The objects of the suit are to have a certain redemption by the directors of the Montana Gold, Silver, Platinum & Tellurium Mining Company from an execution sale of the property of said company declared to have been made in favor of the company and its stockholders, to have the individual defend-

ants who obtained the sheriff's deed to the property declared trustees of said property, to obtain an accounting by such defendants of the proceeds of said property while in their possession, to quiet title to the property, and for general relief. * * * Directors of a corporation stand in equity in a fiduciary capacity as to the corporation and stockholders. Whether they should be treated as trustees for such stockholders or company, in the full sense of that term, is immaterial. Standing in a fiduciary capacity, they are not allowed to profit by virtue of their position. They must exercise the utmost good faith in all transactions touching their duties to the corporation and its property. All their acts must be for the benefit of the corporation, and not for their own benefit. If by their acts the directors have received any profits from the company's property or business, they hold the same as trustees for the benefit of the corporation and its stockholders. Illustrations of this doctrine are very numerous, and the principles are so well established that citation of authorities seems unnecessary. Our own court, speaking through Mr. Associate Justice Buck, in the case of *Gerry v. The Bismarck Bank*, 19 Mont. 191, 47 Pac. 810, announces this principle in the following commendable language: 'That a trustee should not be allowed to profit by his trust is a well-known fundamental doctrine of equity. No evasions, no technical subtlety of reasoning, no empty distinctions, should be tolerated when the assertion of this principle becomes necessary. It is true that when the motives of a trustee in the neglect of his duty are not essentially bad, or are readily reconcilable with ordinary honesty of purpose, certain courts

have applied this rule leniently. It is true that weak toleration from the bench of frail, but penitent, humanity, has often apparently robbed the principle of its very life. But such precedents serve only to increase plausible devices for evading its consequences. They encourage the natural tendency of designing selfishness to substitute the vague expression 'business enterprise' for 'business honesty.'

* * * It is also important to notice the method by which these directors acquired the right to become redemptioners. The redemption was made under a judgment rendered in favor of one of their number only two days before the redemption, which was obtained by default based upon the acceptance of service of the summons by another of their number. These facts render it too doubtful for this court to hold that the entire proceeding was open, above-board, fair, and equitable. * * *

We therefore advise that the decree of the lower court be reversed, and that the court be directed to enter a final decree * * * declaring and adjudging that the redemption of the company's property made by them or their predecessors in interest was made for the benefit of the defendant mining company, and that they hold the legal title to all of said property in trust for said company; that they reconvey the same to said company, and that said company's title thereto be quieted as against said defendants. * * *

Counsel for defendants claim that there is no fraud in fact alleged against defendants in the complaint. Whether this is true, we deem immaterial. A breach of official duty on the part of the defendant directors is clearly alleged and relied upon. This is a fraud in law, and sufficient to warrant relief if proven. It is

very difficult to distinguish the effect of fraud in fact from the effect of fraud in law. Usually the two classes concur in their effect. It is the same. * * * Proof of either class of fraud is sufficient to warrant relief. Therefore allegations and proof of a breach of official duty are all that is necessary."

In *Fagan v. Stuttgart Normal Institute* (Ark.), 120 S. W. 404, the doctrine is expressed in the following language:

"A director cannot, as a general rule, make a valid purchase of the property of the corporation at a public or judicial sale. He may become a creditor of the corporation, if the transaction is open and *bona fide*, and in such event, to protect himself, he may purchase at a judicial sale, but if he purchases at such a sale to satisfy the claim of another, his purchase, in equity, is subject to be set aside at the instance of a party in interest. He is considered in equity as being a trustee for the stockholders and creditors of the corporation, and his position as a bidder is inconsistent with that relation. His appearance as a bidder may have the effect to prevent bidding, and his private interest may conflict with his duties as a trustee of the corporation, in protecting their interests. The rule, as sustained by sound moral principles and the weight of authority, is that, where a director purchases at a judicial sale the properties of the corporation, he does so subject to the right of the corporation or its stockholders to disaffirm the sale and to demand a resale without showing any actual fraud or any actual prejudice."

The Supreme Court of California had this question under consideration in *Smith v. Pacific Vinegar & Pickle Works*, 78 Pac. 550, and we quote the following brief excerpt from the lengthy opinion of the court:

“Broadly stated, the legal proposition insisted on by appellant is that one occupying a fiduciary or trust relation to a corporation cannot, while such relation exists, enter into any express contract with himself individually relative to the trust property which will be binding on the corporation; that such a contract is a breach of trust, and voidable at the mere election of the corporation, if not absolutely void; and that, when such a contract is sought to be enforced, the court will not permit any investigation as to the fairness or unfairness of the transaction, nor will it permit the trustee to show that it was not detrimental, or that it was even advantageous to the beneficiary.”

The New York Court of Appeals in *Billings v. Shaw*, 103 N. E. 142, had this to say in affirming and applying the doctrine contended for on behalf of appellant:

“Directors of corporations act in a fiduciary capacity. In every action where the interest of the corporation is involved, particularly where the same is in conflict with the individual interest of the directors, they act as trustees and are strictly accountable to the creditors or stockholders of the corporation for their action.”

“It was stated by this court in substance in *Munson v. Syracuse, Geneva & Corning*

R. R. Co. (103 N. Y. 58) that all acts of a director in his own behalf when his personal interest is in conflict with that of the corporation are invalid at the election of the corporation. The court say (p. 74): 'The law permits no one to set in such inconsistent relations. It does not stop to inquire whether the contract or transaction was fair or unfair. It stops the inquiry when the relation is disclosed, and sets aside transaction or refuses to enforce it, at the instance of the party whom the fiduciary undertook to represent, without undertaking to deal with the question of abstract justice in the particular case. It prevents frauds by making them, as far as may be impossible, knowing that real motives often elude the most searching inquiry, and it leaves neither to judge nor jury the right to determine upon a consideration of its advantages or disadvantages, whether a contract made under such circumstances shall stand or fall. * * * The value of the rule of equity, to which we have adverted, lies to a great extent in its stubbornness and inflexibility. Its rigidity gives it one of its chief uses as a preventive or discouraging influence, because it weakens the temptation to dishonesty or unfair dealing on the part of trustees, by vitiating without attempt at discrimination, all transactions in which they assume the dual character of principal and representative.' "

See, also, for full discussion of the question:

10 *Cyc.* 814, 815;

Cook on Corporations (6th Ed.), Secs. 648, 853;

Pomeroy's Equity, Secs. 958, 1052;
21 *Ency. of Law*, 904;
Thompson on Corporations, Sec. 4171;
Tobin v. Frazier, 17 S. W. 25, 28;
Collins v. Hoffman, 113 Pac. 625.

The principle is announced in nearly all the above citations that by the mere fact of purchase a presumption is raised that the property is taken for the benefit of the corporation and while circumstances may exist in special cases permitting a director to purchase for his individual use, the presumptions are to the contrary. The burden is on such director to show *bona fides* and establish such special circumstances as would permit him to take and hold the corporate property in opposition to the corporation. This we confidently assert has not been done in the present instance. The evidence shows, on the other hand, a collusive intimacy between Black, a trustee, and Bell, a mortgagee, and some time attorney for the corporation, the purpose and final result of which was the joint acquisition by them of the entire assets of The Company, and whether the fraud be considered as actual or constructive and without regard to the regularity of the proceedings discussed under previous heads, appellees cannot now be permitted to retain the assets of The Company thus acquired in violation and disregard of fiduciary relations.

In closing the discussion under this head and as strongly tending to show that the foreclosure suit was conceived and instituted for the single purpose of enabling Black and Bell to acquire the assets of The Company without any regard whatever for the rights of the stockholders, we desire to call attention to the fact that the record in said foreclosure suit does not show that the receiver ever made a final report and though he claims to have received \$2000 in cash from the sale of the property in controversy no showing is made as to the disposition thereof, nor does the record in that case show that further proceedings of any kind were ever had in said suit subsequent to the confirmation of the receiver's sale.

This anomalous situation is worthy of serious consideration in connection with all the other circumstances surrounding the institution and progress of said suit, and to our mind strongly tends to show fraud and collusion in the premises.

V.

THE CAUSE SET FORTH IN THE BILL OF COMPLAINT IS NOT BARRED BY ANY STATUTE OF LIMITATION OR BY LACHES.

That the jurisdiction of and practice in the federal equity courts is uniform throughout the

United States and not subject to restriction by the local statutes of the state in which the court may sit nor by the construction placed thereon by the local tribunals is, of course familiar law to this court. It is likewise fundamental law that federal equity courts will in all character of cases refuse to be absolutely bound by state statutes of limitations. In many instances they interfere for the express purpose of preventing an equitable claim from being barred by an inequitable application of the statutes, while in other cases, entirely free from fraud or any breach of a fiduciary relation, courts of equity will sometimes adopt the statutory period as the time beyond which the injured party will be deemed to have slept on his rights. Briefly stated, federal courts of equity endeavor to ascertain the facts in each case with a view to determining whether the complainant has been guilty of such laches as to bar recovery.

The distinguishing features between the doctrine of laches and statutes of limitation is well described in *Galihier v. Cadwell*, 145 U. S. 368, 36 Law Ed. 738, as follows:

“Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced — an inequity founded upon some change in the condition or relations of the property or the parties.”

This rule has probably been applied more frequently in the matter of the enforcement of constructive trusts than in any other connection.

“Where the trust sought to be enforced is constructive and arises out of the fraud of the alleged trustee, the question as to what time will constitute a bar is peculiarly within the equitable discretion of the court, to be decided in each case according to its nature and circumstances, subject to the qualification that diligence must be used to establish the trust, and that equity will not aid a party where the demand is stale or where there has been long acquiescence in the wrong.”

15 *Am. & Eng. Ency. Law*, 1206.

In the leading case of *Michoud vs. Girod*, 4 How. 504, 561 (11 Law Ed. 1076, 1102), a proceeding to enforce a constructive trust, it is said:

“Although the statutes of limitations do not apply to any equitable demand, courts of equity adopt them; or at least generally take the same limitations for their guide, in cases analagous to those in which the statutes apply at law. (10 Ves. 467; 1 Cox., 149.) Still within what time a constructive trust will be barred must depend upon the circumstances of the case. (*Boone vs. Chiles*, 10 Peters, 177.) There is no rule in equity which excludes the consideration of circumstances, and in a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved, or

within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

Discussing the effect of statutes of limitation in equity cases in the federal courts, in *Sullivan vs. Portland Etc. R. Co.*, 94 U. S. 806, 24 Law Ed. 324, Justice Swayne said:

"Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; in some cases a shorter time is sufficient; and sometimes the rule is applied where there is no statutable bar; it is competent for the court to apply the inherent principles of its own system of jurisprudence, and to decide accordingly."

The rule announced in the above authorities was applied by this court in *Northern Pac. Ry. Co. vs. Boyd*, 177 Fed. 804, 823, where it was held that a delay of twenty years was not a bar to the granting of the relief prayed.

Speaking through Justice Gilbert, it was said:

"The doctrine of laches rests upon equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case. The ultimate inquiry is on which side would fall the balance of justice in sustaining or denying the defense. The important elements to be considered are the length of time which has elapsed, the nature

of the acts which have been done in the meanwhile, the knowledge which the complainant had of the fraud which he charges, and the time when he acquired that either and the change in the situation during neglectful repose either as to the loss of evidence which would have been available to the defendant or the advance in value of the property which may be the subject of the suit."

The opinion of this court in the Boyd case was affirmed by the Supreme Court of the United States in the 228 U. S. 482, where in rejecting the contention of the Railroad Company, that Boyd was barred by the lapse of time, Justice Lamar said:

"Lastly, it is said that Boyd was estopped from attacking, in 1906, a reorganization completed in 1896, and, ordinarily, such a lapse of time would prevent any creditor from asserting a claim like that here made. For along with the policy to encourage reorganizations goes that of requiring prompt action by those who claim that their rights have been injuriously affected. The fact that improvements are put upon the property—that the stock and bonds of the new company almost immediately became the subject of transactions with third persons—calls for special application of the rule of diligence. But the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and unless the non-action of the complainant operated to damage

the defendant, or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time."

For the application of the rule of laches as distinguished from statutes of limitations see also:

Kirby vs. Lake Shore Etc. R. R. Co., 120

U. S. 130, 30 Law Ed. 569;

Stearns v. Page, 7 How. 819;

Gladden v. Kimmel, 99 U. S. 202;

Payne v. Hook, 74 U. S. 430;

Stevens v. Grand Central Mining Co., 133
Fed. 28;

Burns v. Copper, 140 Fed. 279;

Davis v. Louisville Trust Co., 181 Fed. 22;
16 Cyc. 152, and cases there cited;

Street's Federal Equity Practice, Secs.
211, 212.

We desire to call the court's attention especially to the case, above cited, of *Stevens v. Grand Central Mining Co.*, 133 Fed. 28. This was a suit similar in many respects to the case at bar and was brought to enforce a constructive trust approximately ten years after patent to certain claims had been fraudulently issued. The opinion by Justice Van Devanter contains an exhaustive discussion of the question here presented.

The order confirming the receiver's sale was made and entered on April 5th, 1909 (Tr. 165,

166), the bill of complaint herein was filed and subpoena issued on March 26th, 1912 (Tr. 20), less than three years after the entry of said order of confirmation. Section 159 of Remington & Ballinger's Codes and Statutes, allowing three years for the institution of an action based on fraud, would control this proceeding were it an action at law. As just stated this suit was brought within the three year period.

This, however, is a purely equitable case, and, measured by the rule of the above decisions, the defendants have not, we submit, set up in their respective answers any facts to justify the court in holding that the appellant has been guilty of laches. The property is still in the hands of the appellees and the bill of complaint prays for the appointment of a receiver to the end that equity may be done in the premises between all the parties concerned. The record does not disclose that there has been any change in the affairs of the parties or the condition of the property that would warrant the court in holding that in equity and good conscience the stockholders of The Company are now barred from demanding relief. No condition is shown that would prevent a receiver, under the direction and guidance of a court of equity from doing justice between all the parties concerned. Surely it cannot be conscientiously said, under the circumstances here presented, that because of a de-

lay of less than three years, in equity and justice the complainant should not be permitted to come in and lay bare the fraudulent transactions and breaches of trust and confidence whereby The Company and its stockholders have been deprived of their property.

In view of the foregoing the decree appealed from should be reversed with instructions to the lower court to enter a decree pursuant to the prayer of the bill of complaint.

Respectfully submitted,

O. C. MOORE *and*

GEORGE H. WALKER,

Solicitors and Counsel for Appellant.

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NO. _____

IN THE
**United States Circuit
Court of Appeals**
FOR THE
Ninth Circuit

G. J. BUCHLER,
Appellant,

VS.

W. W. BLACK, FRANK L. BELL and SUNSET COP-
PER MINING COMPANY, a corporation,
Appellees.

Appellee Black's Brief

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

Filed

MAY 7 - 1915

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pellee Black, Stokes Building,
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STATEMENT OF CASE.

The statement of facts is very fully and fairly set forth in the opinion of Honorable Judge Neterer in his opinion. (Tr. 75-78.) We hereby refer to the same and make it a part hereof.

In view of the very one sided and as we think unfair statement contained in appellant's brief we call attention to the facts as shown by the records as follows:

The appellant, complainant below, instituted this suit for himself alone and nowhere in his Bill of Complaint alleges that he brings it in behalf of "other stockholders" as stated in appellant's statement. (Tr. 3, Par. 1 of Complaint, Tr. 4, Pr. VII.) in which he specifically states he seeks to "redress wrongs committed against him." (Bottom of Tr. 4.) The action is brought to have the title of Black and Bell, purchasers of the property of the corporation at a receiver's sale, impressed with a constructive trust.

The Sunset Copper Mining Company was a corporation organized under the laws of Washington, and is named as a party defendant, but it was never served and made no appearance in the lower Court. It was not made a party to this appeal and no citation was issued against it, and neither the trustees nor shareholders were made parties.

The corporation had a board of five trustees (Tr. 8, Par. XIII), Black being one. Bell was never a trustee except for one day many years before the things complained of in the Bill of Complaint. (Tr. 76, 109.) W. H. Baldwin was the dominating influence in the corporation. (Tr. 76, 100.)

Baldwin and four of the trustees resided in New York. Black was the only resident of Washington. The relations between Black and the four eastern trustees were some-

what strained, at least there was some friction between them. (Tr. 99, 100.) The same was true as to Black and Bell. (Tr. 102, 108, 110.) The only time Black and Bell entirely agreed "was the night before the sale" when they agreed upon the price to be bid for the property. Both were creditors and both were evidently attempting to protect their claims. (Tr. 110.)

Complainant made no attempt to comply with Equity Rule 27 and there is no evidence that either Bell or Black had exercised any influence over the officers or Board of Trustees of the corporation (Tr. 78), and no allegation was made in the Bill that any demand was ever made upon the officers of the corporation to do anything to protect appellant or other stockholders and there is not even a hint in the evidence as to any reason why this was not done.

The corporation in 1904 and 1905 had secured loans from Ellen C. Baldwin amounting to \$29,384.10 which it used in improving its property. (Tr. 102) The company gave her mortgages to secure this sum which were assigned to Bell. (Appellant's Brief, 4., Tr. 107).

In 1907 Bell threatened to foreclose these mortgages unless the other stockholders would pay their proportion of the money to do the assessment upon the mining property to enable the Company to hold the mining claims. Black was opposed to foreclosure and went to New York where he met Bell and threatened to fight the foreclosure and make the foreclosure proceedings very expensive for Bell unless he would give Black a reasonable time, which was understood to be about a year, in which to take care

of the mortgage debt. This delay was finally agreed upon. (Tr. 102, 108.)

Black was unable to provide for the payment of the mortgage during the year. (Tr. 109.) Bell then prepared and sent to all the stockholders of the company, including the appellant, a circular setting forth the condition of the company, the approximate amount of the debts, the fact that there was no money with which to do assessment work or obtain patents upon its mining claims, and that the company was in danger of losing its property, offering on his part to advance his pro rata if other stockholders would also do this (Tr. 109.) (Circular Tr. 152, 154.) and calling attention to the fact that a receivership was threatened. He received not over \$70.00 and returned this small sum.

When Bell found that Black could not raise money to protect the company's holdings and the stockholders would not and Black having promised that he would not make it expensive if Bell would delay a year to enable Black to raise money to save the company's holdings, he wrote to Black asking him to give him the name of some attorney who would act as his attorney with as little expense as possible. Black sent him the names of several attorneys among them being Mr. Sandidge, whom Bell had met. Bell then employed Sandidge as his attorney. (Tr. 109.) Black did not retain Sandidge as stated in appellant's Brief P. 6, but suggested Sandidge among others who would not be expensive. (Tr. 109.) Bell then started his action in the Superior Court alleging among other things the nature and kind of property held by the com-

pany, the necessity of doing the assessment work in order to hold the mining claims and the danger of the loss of property and set out the notes and mortgages securing the same, and the fact that the Company was wholly insolvent bringing the case in accordance with Rem. & Bal. Code for Washington (Sec. 741, Sub. 5.) And he prayed for the appointment of a receiver with power to sell the property to pay the indebtedness. (Tr. 115, 118) Bell also set up facts sufficient to authorize the foreclosure of his mortgages if for any reason the receiver was not appointed with full power to sell property. Black was a trustee at this time and was also a large creditor, having advanced large sums to enable the Company to save its property. (Tr. 102, 103, 139, 148, 149.) Black was also at that time Judge of the Superior Court of the county in which the mining property was located and in which the action had to be commenced. Evidently for these reasons the summons and complaint were served upon the president of the Company who acknowledged in writing that "due and timely" service was made upon the corporation, which writing was filed in the Superior Court. (Tr. 119.) At the same time a notice of the application for a receiver was served upon the president of the corporation. He acknowledged "due and timely service" as to this notice. (Tr. 121.) At the same time an affidavit of Bell for the appointment of a receiver was likewise served upon the president who also acknowledged "due and timely" service. (Tr. 124.) All of these proceedings were in compliance with the laws of Washington with reference to an application for a receiver.

The notice of the application for a receiver named

Dec. 9, 1908, "or as soon thereafter as counsel could be heard" as the time of the application (Tr. 121.), not simply Dec. 9, 1908, as stated in appellant's brief, P. 5.

Black being interested in the litigation could not hear the action. Judge A. W. Frater of the Superior Court of Seattle heard the matter and appointed J. B. Fogarty Receiver. (Tr. 126, 127.) The order names him as "Receiver" not temporary Receiver, as erroneously stated in appellant's Brief, P. 6. Black saw Fogarty and asked him if he would act. (Tr. 97.) He consented, took his oath, filed his bond, and entered upon his duties. (Tr. 127, 128, 129.) His appointment was confirmed and made permanent by another decree. (Tr. 132.) Black knew the facts and knew of no defense. He was, however, a trustee, and Judge of the Superior Court and also a creditor. Black evidently for the purpose of avoiding any criticism that might arise if the Company had no attorney and as an act of precaution employed an attorney, D. W. Locke, to defend for the Company. He employed Locke several weeks before the trial. (Tr. 96.) Locke says he looked after the matter just as carefully as any other case that was put in his hands. He examined the proceedings and looked up the records. (Tr. 95.) He then made a formal appearance (Tr. 130) and appeared at all the further numerous hearings. (Tr. 130, 131, 150, 165.)

Appellant in his Brief, P. 6, states that Locke made but one appearance, yet while the transcript does not purport to set forth all the orders and hearings had in the Superior Court the transcript shows four appearances by Locke for the corporation. In addition to the several general appearances made by Locke as attorney for the

defendant Sunset Copper Mining Company, Nicholas Rudebeck and L. F. Reid, stockholders, made general appearance in said action, making among other things objections to the sale of the property and also to the confirmation of the sale (Tr. 97, 150, 151, 158, 159), appearing by several firms of attorneys. Reid appeared "for himself and for other stockholders" (Tr. 159.) as did also Rudebeck. (Tr. 141.)

The property was sold on March 20, 1909, to Black and Bell for \$40,000.00 being more than \$24,000.00 less than the indebtedness. Appellant had knowledge of the pendency of the action, of the condition of the Company, of the sale to Black and Bell before the confirmation and the amount of the bid, and was at all times informed as to the affairs of the Company; was in correspondence with attorneys; knew of the appearance of Reid for stockholders before the confirmation; knew it was necessary to expend large sums in order to keep title to the property, yet waited more than three years after the sale while Black and Bell were expending about \$25,000.00 upon the property after the sale, not including attorney's fees, before he began this action. (Tr. 78, 103, 104, 105, 173, 174, 176, 179, 187.)

During the progress of the action from Dec. 1908 to April 5, 1909, by reason of Black being interested in the action he could not act as Judge. It was very difficult to get judges to sit in his place as at that time of the year all were busy. Judges were called in from time to time to hear the matters, the actual obtaining of the Judges being made by the Court stenographer. (Tr. 106.) When

no Judge could be secured a Judge Pro Tempore was agreed upon by the attorneys in the action and approved by Judge Black in pursuance of Rem. & Bal. Code of Wash., Vol I., Sec. 40. He was not selected by Judge Black as stated in appellant's Brief, but "approved" as the law required.

When appellant began his action he claimed the Superior Court proceedings were void and he prayed that the proceedings and judgment in the Superior Court be declared to be void, but afterward he waived this claim and amended his Bill of Complaint by striking out that portion of the prayer. (Tr. 23.)

While in the Bill of Complaint it was alleged that the notes and mortgages executed in favor of Ellen C. Baldwin were "fraudulent" and that the bid of \$40,000.00 was "absurdly low" and that Bell and Black and others "conspired," "confederated" and were in a "collusive scheme" and made free use of these and other like terms he introduced no evidence tending to sustain a single controverted allegation in the Bill.

They proved that the notes were given for cash paid to the Company to the full amount named in the notes and that this cash was used by the Company in developing its mining claims. (Tr. 102.) The only evidence as to the value of the property was the fact that Black and Bell bid \$40,000.00. Instead of proving that Bell and Black and others "conspired" together to injure the Company they proved that there was friction between them and that the only persons who protected the property or attempted to do so were Black and Bell and that they advanced large

sums to do assessment work when appellant and all other stockholders, after being begged to do so, had absolutely refused to contribute (Tr. 109), and that only after the refusal he brought an action so that the property could be sold to pay its debts.

Prior to the time Bell brought his action in the Superior Court appellant obtained an option on the stock, notes and mortgages hed by Bell but was not able to sell it. (Tr. 104, 105, 106, 109.) When appellant found he could not sell the Bell holdings he urged Bell to foreclose the mortgage, buy in the property and let appellant sell it. He not only asked Bell to do this but asked Black to consent to this. Both Bell and Black refused to comply with his request. This was before Bell sent out his circular asking stockholders to contribute pro rata to save the property. (Tr. 106, 109, 152.)

When Bell brought proceedings to have the property sold to pay the debts without agreeing to appellant's terms, appellant did nothing to prevent the sale or to protect the property. After Bell and Black had purchased the property on a bid of \$40,000.00 and the sale had been confirmed they offered to allow stockholders to share in that bid pro rata. (Tr. 110.) Appellant did not avail himself of this opportunity although the offer was kept open, and at the trial in the U. S. District Court Bell renewed the offer. (Tr. 110.) Appellant was present at the trial and testified, and did not deny any of these facts. (Tr. 103.) He then waited for more than three years after the sale to Bell and Black and until after they had done the necessary assessment work, caused the claims to be surveyed,

made an application for patent, paid the government for the land and until after every expense connected with obtaining title had been incurred and paid by Black and Bell before he brought this action in equity.

Upon the trial the U. S. District Court dismissed appellant's action. He appeals therefrom.

POINTS

I.

The assignments of error by appellant are too broad and general and not sufficiently specific to warrant the Court in noticing them. This applies to each, all and every of them, but especially as to numbers VII., VIII., IX., X., XI., and XII.

II.

The Sunset Copper Mining Company is an indispensable party to the action. No service having been made upon it and it not having appeared it was not a party and the District Court rightfully dismissed the action.

III.

If it be claimed that after the sale of all of its property the corporation became defunct then the trustees of the corporation are indispensable parties and the suit was rightfully dismissed.

IV.

Appellant is estopped from claiming that the corporation was defunct as in the Bill of Complaint appellant described it as a corporation and named it as a defendant and alleges in his Brief herein that it is a corporation.

V.

The District Court rightfully dismissed the action under rule 27 of New Equity Rules.

VI.

Appellant cannot be allowed to claim that the proceedings in the Superior Court were null and void, first, because the appellant in the United States District Court voluntarily amended his prayer in his Bill of Complaint so as to show he was making no such claim. Second, because it is inconsistent with the prayer to have appellees declared trustees for the benefit of stockholders and at the same time declare that they have no title. A party cannot be heard to deny or impeach the title of another in property upon which said party seeks to impress a constructive trust as against that other.

VII.

The Superior Court had jurisdiction of the original action, first, because the president of the corporation was served with summons and complaint. Second, because the president of the corporation by writing filed in said cause solemnly admitted "due and timely service," and thus solemnly waived any additional service. Third, because the corporation made a general appearance by its attorney. Fourth, because stockholders for themselves and for all other stockholders appeared in the action. Fifth, because the Superior Court found that due and legal service was made upon the defendant corporation and the presumption of law is that it had jurisdiction at least in the absence of proof to the contrary. The transcript of the evidence fails to show that the service shown in transcript is the only service made upon the corporation.

VIII.

The findings of fact made by the trial judge in his decision and unobjected to by appellant and not assigned as error by appellant and therefore binding upon him support the trial judge's decision below in dismissing the bill and therefore this appeal should be dismissed, irrespective of the errors assigned by appellant.

IX.

Black and Bell, each having been shown to have been undisputed bona fide creditors of the Sunset Copper Mining Compayn, had a right to purchase the property at a receiver's sale to protect their claims, regardless of any official relation that they, or either of them, might sustain towards said corporation. Bell, in addition, had no connection with the corporation.

X.

That the appellant is guilty of laches so marked in character as to both justify a court of equity in denying him relief and to require such a court to dismiss the bill. He waited more than three years before bringing his action, delaying while appellees necessarily spent more than Twenty-five Thousand Dollars in improving and protecting the property. The appellant had knowledge of the sale at the time and knowledge that it was necessary to spend large sums to preserve the title and had knowledge that the Company was insolvent.

XI.

The questions presented to this Court are all *res adjudicata*, in that they were presented and determined by

the Superior Court of the State of Washington in and for the County of Snohomish, in the suit of Frank L. Bell against the Sunset Copper Mining Company, and also upon objections made and presented to said Court to the sale of the property of said mining company by the receiver, and to the confirmation of such sale by the Court, said objections being made by a stockholder for himself and for all stockholders similarly situated.

XII.

That before the complainant can have a decree from a Court of Equity the appellees, Black and Bell, must be placed in *statu quo*, and the appellant, through his counsel, and in open court, has manifested an unwillingness to so place the said appellees, and is seeking to impose upon the property a further burden of large attorney fees, together with the expenses of a receivership, and seeks to have that made a first lien upon the property, notwithstanding the existing priorities of Black and Bell as undisputed, bona fide creditors of said corporation. But appellees cannot be put in *statu quo*. Appellees' valid claims amount to more than One Hundred Thousand Dollars, with interest, and the property is not worth more than Forty Thousand Dollars. Any decree in favor of the appellant would be profitless to any stockholder in the corporation and therefore a vain and idle act upon the part of the Court.

XIII.

Appellant brought this action for himself alone and not on behalf of other stockholders. He has made it simply his personal action and has not brought it for himself and other stockholders.

XIV.

The appeal should be dismissed for the reason that the Sunset Copper Mining Company is a necessary party to this appeal and it appears that the corporation is not made a party and it was not served with notice of this appeal and no citation was sued out or served upon said corporation.

XV.

The original action brought by Bell was primarily an action to have a receiver appointed with power to sell the property as provided by the laws of Washington.

XVI.

There is no equity in favor of appellant or any other stockholder.

XVII.

The appellant has no remedy other than, or different from, that which is available, to the corporation itself, namely: To appear in the original action and ask leave to have the judgment therein opened and permission to come in and defend.

XVIII.

The complainant himself invited appellee Bell to foreclose the mortgage, and acquire title to the property in order that the appellant might become a purchaser thereof from Bell; he solicited appellee Black to use his influence to procure appellee Bell to foreclose the mortgage, and he is estopped by such solicitation to complain of the sale of the property to satisfy the indebtedness.

XIX.

The appellant's claim is stale.

XX.

The evidence wholly fails to show that the appellees, Black and Bell, have failed in the performance of any duty owed by them, or either of them, to the corporation, or that they, or either of them, were guilty of any acts or conduct inconsistent with their relationship to the Sunset Copper Mining Company.

XXI.

All the evidence shows the equities are upon the side of appellees.

ARGUMENT AND AUTHORITIES

POINT I.

It seems to us too clear for argument that the assignments of error 7, 8, 9, 10, 11 and 12 are too general and are not at all specific. Any error could be predicated upon these broad general assignments. As to the other assignments of error if the Court did err in any or all of them it is only an error as to his reasons for dismissing the action. If the Court did err in holding there was no collusion between Black and Bell that would not be sufficient for a reversal because if the proper parties were not made defendants or if appellant did not comply with the rules of the Court or if his evidence showed no equity in favor of himself in any way or if appellees could not be put in *statu quo* or if upon the whole appellant was not wronged or if the Court could see that the stockholders would not be benefitted by holding Black and Bell as trustees the

Court ought to dismiss the action. The same reasoning is applied to II., III., IV., V and VI.

It seems self evident to us that a mere inspection of assignments of error 7, 8, 9, 10, 11 and 12 will show that these assignments are not specific. We think the Court should not take notice of these assignments, but on this rule should dismiss the appeal.

Grape Creek Coal Co. vs. Farmers Loan etc., 12
C. C. A., 350.

Doe vs. Waterloo Min. Co., 17 C. C. A., 190.

Andrews vs. National Foundry & Pipe Works, 25
C. C. A., 110.

Columbus Safe Deposit Co. vs. Burke, 32 C. C.
A., 67.

Rule 4, Circuit Court of Appeals, Sec. 2.

POINTS II., III. AND IV.

We prefer to combine our arguments as to these three points because they are merely different phases of the same point and we think that the mere statement of the points ought to be sufficient.

“Where the object of the action is to prevent or redress a wrong to the corporation, the corporation itself is an indispensable party either as plaintiff or defendant.”

10 Cyc. 995, Sub. 2.

In an action, the object of which is to restore to the corporation assets which its directors and officers have

unlawfully converted to their own use, the corporation itself is certainly an "indispensable party."

10 Cyc., 996, B.

Porter vs. Sabin, 149, U. S. 473, 478.

Whitney vs. Fairbanks, 54 Fed., 985.

Dickerman vs. Northern Trust Co., 176, U. S.,
181, 188.

"Where the contest may be between shareholders and third persons the corporation is a necessary party."

10 Cyc., 996, 997.

If there is no process upon the corporation nor a voluntary appearance the suit must be dismissed.

10 Cyc., p. 997, Sub. V.

Counsel for appellant when the action was commenced recognized this principle of law and named the corporation as a party defendant. It was not served with any process and made no appearance in the action. There is nothing in the record, in the decision of the lower Court, or otherwise, to indicate that the Sunset Copper Mining Company was ever served with any process or that at any time it appeared in the action. It can hardly be claimed that in the absence of some decree of the Court or reference by the Court or the records that it was served, that the presumption would be that it was properly served. As a matter of fact it never was served nor did it appear and nowhere in the record is there a hint that it was served. Where a necessary party has been omitted the objections may be taken on appeal. (2 Cyc., p. 687, Sub.

B.) As the corporation was named as a party defendant this objection could not be taken by either answer or demurrer, as appellees had a right to assume that being named as a party it would be duly and properly served. It may be claimed, however, that after Bell and Black had purchased all of the property of the Company that it became defunct. In view of the records we can see no foundation for this claim as in the Bill of Complaint the Sunset Company is described as a corporation organized under the laws of the State of Washington. In the decision of the lower Court it was found that it was then a corporation. In appellant's brief, page 6, he still describes it as an existing corporation. The laws of the State of Washington provide that when a corporation shall be dissolved the trustees of such corporation shall hold title to the property. The language of the statute is as follows:

“ * * * * * and it shall thereupon be dissolved and the trustees of the corporation shall hold the title to the property of the corporation for the benefit of its stockholders and creditors to be disposed of under appropriate Court proceedings.”

Vol 2, Rem. & Bal. Code 3715 d.

So that in that case the trustees of the company, of which there were five, held the title and it is certainly clear that if for any reason the corporation had become defunct the owners of the equitable title must be parties to the action. Aside from the statute this must either be the trustees or the shareholders. It seems to us too clear for argument that the Sunset Copper Mining Company was an indispensable party defendant and that if it

was not served with process and did not appear it was not a party by the mere naming of it in the Bill of Complaint as a defendant. It is equally clear that if the corporation were defunct that either the trustees or the shareholders, the holders of the equitable title, should have been made party defendants in this sort of an action. It not being made a real party the lower Court should have dismissed the action for that reason if for no other. It is true the learned Judge did not give that for his reason for dismissing the action, but it is too well settled for argument that where a Court dismisses an action and gives the wrong reason yet if there were a proper reason why it should have been dismissed, the judgment must stand.

POINT V.

Nowhere in the Bill of Complaint is there any allegation that the appellant, before bringing his action, made any demand upon the officers or trustees of the Sunset Copper Mining Company to take any steps to redress the wrongs complained of and there is not the slightest hint in the evidence that there was any excuse for not doing so. The corporation had a board of five trustees (Tr. 8, Bill of Complaint, paragraph XIII.), Black being one of the trustees. Bell was a trustee only for one day in 1904. (Tr. 76, 109.) The dominating influence in the corporation was W. H. Baldwin and four trustees who resided in New York. (Tr. 76, 99, 100.) There always appeared to be some friction between Black and Bell and the Eastern trustees. (Tr. 99, 100, 102, 108, 110.) There is not a word of testimony in the transcript which tends to show any different relation existing between Black and Bell and

the other trustees. Unless the evidence is entirely ignored it cannot be claimed that the president of the corporation and the four trustees might not have been willing to bring an action against Bell and Black if there was any occasion therefor and it was appellant's duty under the rule and under the authorities aside from the rule to have made a demand upon the president or the other trustees of the corporation before bringing this action. It is true that in the Bill of Complaint appellant if not directly stating, at least makes such allegations from which it might be inferred that Black and Bell were the dominating influences in the corporation and by fraud deprived the corporation of its property, but in the evidence there is not a single word or line of testimony that indicates this, but on the contrary the proof is clear that Bell never was a trustee except for one meeting years before the happening of the things complained of by appellant and that Black, while a trustee was only one of five and that at least Black did not dominate the affairs of the Company. He was the only Washington trustee and seemed to be fighting for the minority stockholders against the Eastern officers and stockholders.

The action was rightfully dismissed by the District Court under Equity Rule 27.

Hawes vs. Oakland, 104 U. S., 450.

Macon D. M. S. R. Co., vs. Shayler, 141 Fed., 585.

Edwards vs. Merc. Trust Co., 124 Fed., 38.

POINTS VI. AND VII.

We treat both VI. and VII. together in this argument.

The transcript shows that the president of the corporation was served with summons and complaint and also was served with notice of the application for the appointment of a receiver. (Tr. 121.) Counsel for appellant in his brief insists that the summons was not in proper form and that it could not be served in New York, without giving any real reasons therefor. It is true that the laws of Washington provide that the corporation may be served by filing the summons with the Secretary of State, where there is no person within the state upon which service can be made, but does not say that it must be so served, but in addition to this service the president of the corporation solemnly in writing filed in the Superior Court, acknowledges, "due and timely service." (Tr. 119.) Certainly the president of a corporation can appear in Court and waive service of summons upon the corporation. The laws of the State of Washington provide for service of notice upon the defendant where a receiver is applied for, but it gives no form of notice or any provision for the service. Service was made upon the president of the corporation of the notice for the application of the appointment of a receiver. (Tr. p. 121.) The president of the corporation in a writing filed in said Court, acknowledged "due and timely service" of the notice. The Sunset Copper Mining Company had notice of this application and its president admitted due service. Is it to be said that if a president of a corporation goes into Court and files an acknowledgment that the corporation had been duly served with summons and complaint and notice of an application, that that is to be held for naught? If that be true it opens the way for fraud upon litigants. Counsel for appellants insinuates that

something very wicked must have been planned because the manager and trustee who lived in Washington was not served with the summons and with the notice of application for the appointment of a receiver. We think that counsel would find something to complain of whatever method had been pursued. If the manager had been served he would have seen "collusion" in that. The manager was Judge of the Superior Court; he was a creditor of the Company, and counsel would have insisted that service should have been had upon the officers of the Company who did not stand in that relation. No doubt because Black was Judge of the Superior Court and also manager of the corporation and also a creditor it was thought that some criticism might be made if served upon him and therefore direct notice was given to the president of the corporation. It cannot be claimed that there was any attempt at any rate to keep the corporation itself from having full knowledge of the proceedings. There could be no moral turpitude even if there were some legal defect in serving the summons upon the president of the corporation instead of upon the general manager who was a creditor of the Company. We think it is entirely immaterial whether the service upon the president was proper or improper. The general manager of the Company did employ D. W. Locke, an attorney, to make a defense. He certainly did appear in the action and while counsel spends a good deal of time and cites many authorities to the effect that an unauthorized appearance by an attorney does not give the Court jurisdiction, he overlooks the fact that there is nowhere any testimony that D. W. Locke, who appeared as attorney for the defendant, was not duly authorized. He was em-

ployed weeks before the case was tried. (Tr. 96.) He says he looked after that case "just as carefully as any other case that was put in my hands." He says when he was retained he was simply told to represent the mining Company. (Tr. p. 95.) He says that he examined the records of the Company and investigated whether or not the trustees had authority to execute the mortgage and he appeared on every important hearing had in the case afterward. Surely in the absence of proof that he was not authorized and in face of the evidence that he was employed by the manager of the Company the authorities cited by counsel for appellant are not in point.

The evidence shows that Mr. Locke was employed by the trustee and manager of the Company to act for the Company and that he did so. He made a formal general appearance and appeared on every occasion that it was necessary or proper for an attorney to appear. Appellant's witness, Fogarty, testified that Locke made more than one appearance in court. (Tr. 97, 98.) We think it unnecessary to cite any authorities to show that a general appearance cures any defects, if there were any, that were made in the service of summons. In addition to the foregoing we want to call the Court's attention to the fact that the Court recited in its order appointing a receiver, that

"Due and legal service of this application, together with a true copy of the summons and complaint here, and of the affidavit used upon this hearing, have been duly served upon the defendant, the Sunset Copper Mining Company." (Tr. 125.)

The presumption is that that is true until that presumption is overcome by testimony. Where Courts make such findings in a case where a defective summons or service may appear in the records, the presumption is that other due and proper service was made in the absence of evidence to the contrary. The transcript nowhere recites that the summons set up in the transcript was the only summons and the only service in the action. The transcript instead of purporting to be a complete transcript of the suit in Superior Court shows that it only claims to show excerpts of exhibit B. (Tr. 114.) In addition to this, however, stockholders made a general appearance in the action for themselves and other stockholders. (Tr. 159.) Surely if there was a defective summons, or if it was served at an improper place the appearance by counsel and the general appearance by stockholders, would certainly cure such a defect. When the Court recited there was due service made, in the absence of proof to the contrary this Court must presume there was proper service.

We contend that the recital in the judgment of the Superior Court that due and legal notice of this application together with a true copy of the summons and complaint herein and of the affidavit used in the hearing have been duly served upon the Sunset Copper Mining Company, cannot be attacked collaterally.

In view of the recital the presumption of law is that other records justified the Court in making the finding.

“This is in consequence of the great sanctity attached to judicial records by the common law and their uncontrollable verity.”

Black on Judgments, Sec. 273, Vol. I.

“A defect in the form or matter of the summons or other process not absolutely destructive of its validity * * * although material and sufficient to cause the reversal of the judgment on a proper application, does not deprive the Court of jurisdiction and therefore does not expose the judgment to collateral impeachment.”

23 Cyc. 1075 d.

This is the rule as to judgments of Superior Courts where the defendant is resident within the jurisdiction of the court. Otherwise when the defendant resides out of the state.

(Galpin vs. Page (cited by appellant) 18 Wallace, 350.

“A judgment in an action in which the required number of days’ notice was not given to the defendant is erroneous, but not void and cannot be questioned in a collateral proceeding.”

Black on Judgments, Sec 223, p. 271.

“Although there may be a defect in the notice such as to render the subsequent judgment irregular there will not be such a want of jurisdiction as to make it void.”

Same Section.

See also Black on Judgments, Sec. 224.

The presumptions of law all favor the verity of the judgment and of all recitals therein and of the jurisdiction.

Many Courts go further and refuse to permit an attack on judgments by showing no notice of any kind was served upon defendant where there is recital that he was so served.

23 Cyc., 1075.

In the case at bar a summons was served and the president in writing admitted "due and timely" service.

Counsel for appellant makes much of the fact that notice of the application for the appointment of a receiver states that application would be made on December 9, 1908, whereas the record shows the receiver was appointed on Dec. 10, 1908. (Appellant's brief, p. p. 29, 30.) The only excuse for his argument is based on the misquotation of the record. The notice says the application will be made "on the 9th day of December, 1908, at 9:30 a. m., or as soon thereafter as counsel can be heard." (Tr. 121)

Appellant, however, throughout his brief ignores or garbles the evidence in order to make his argument and where there is not the slightest evidence to sustain him, bases his argument on mere surmise. In view of this record we do not feel it necessary to refer to his authorities or cite others. If the notice did not recite "or as soon thereafter, etc.," we hardly think any Court would hold that the jurisdiction was lost merely because the Court was not able or did not take up the matter at the exact time mentioned in the notice. Suppose, for instance, the Court had not reached the case at 9:30 and reached it at 9:45, would anyone seriously claim that the Court lost jurisdiction? The records show Judge Black was disqualified and

that Judge A. W. Frater, of Seattle, heard the matter. The inference would be that when the case was called Judge Black declared his disqualification and another Judge was called in from another county as Judge Black was the only judge in Snohomish county.

Before the case came on for trial in the lower Court and upon demurrer of Black, while the demurrer does not appear in the transcript, appellant formally amended his Bill by striking therefrom that portion asking that the proceedings in the Superior Court be declared void. (Tr. 23.) We maintain that as this was not urged in the lower Court and on his own motion abandoned, he cannot urge it for the first time on appeal. We insist, however, that it is inconsistent with his entire action. He is seeking to have Black and Bell declared to hold title as trustees for the benefit of stockholders. Surely this cannot be done if Bell and Black have no title.

The whole tenor of appellant's contention in these respects is, that no title, legal or equitable, in the property of the corporation purported to have been conveyed to appellees Black and Bell by the receiver, ever vested in them. The title, therefore, must still be in the corporation, or, if the corporation is defunct, in its trustees. We have, therefore, the analogous position of the appellant urging in one breath that the appellees have no title, and in the next asking the Court to declare that Black and Bell hold the title in trust for the corporation and its stockholders. If appellees Black and Bell have no title, it is elementary that there can be nothing upon which a trust can be imposed and appellant's suit is an invitation to this Court to

do a “foolish, vain and idle thing” by saying in effect to the appellees “though as a matter of fact you have no title whatever to the property in question, nevertheless you do have title, and a constructive trust will be imposed upon it.”

A careful examination of the authorities has failed to disclose a single instance where a constructive trust has been imposed where the title was denied by the appellant.

Beach in his work on trusts and trustees, speaking of implied trusts, says :

“In the establishment of trusts of this class, the end sought *is the separation of the legal and equitable estates*. The legal title is held by the trustee for the benefit of the equitable owner who is regarded as the real owner and as such rightfully receives the legal title by conveyance.”

1 Beach on Trusts and Trustees, page 72.

The authorities cited in appellant's brief to the effect that judgments rendered on an unauthorized appearance by an attorney can be inquired into collaterally have no bearing on the facts. There is certainly no evidence that Locke was not authorized, but the contrary appears. (Tr. 95.) He was employed by the general manager of the Company. In the absence of any evidence to the contrary the authority of an attorney who appears in an action is presumed. The authorities cited by appellant in his brief p. 28 assert this doctrine and we know of none to the contrary. Counsel for appellant did not attempt to call the Court's attention to a word of testimony tend-

ing to show that Locke was not duly employed. The only fault he finds is that Locke was employed and that as the manager thought there was no defense it was not necessary to employ an attorney. The assertion in appellant's brief that Black employed Sandidge as attorney for Bell is based on no testimony in the case. Counsel makes much of the fact that Black was judge of the Superior Court and manager and trustee of the corporation and called in other judges to hear the case; approved a judge *pro tempore* selected by attorneys for the parties and employed counsel to defend. Certainly no one can read the evidence and come to any other conclusion than that Black acted with the greatest propriety and was careful to avoid all proper criticism, because he was judge and was interested he called in other judges to hear the case. He called in three judges and counsel complains of this. The evidence shows that there were numerous hearings between December and April and judges in that part of the state were difficult to get and the court stenographer was authorized to obtain such judges as could come. (Tr. 106.) But, say counsel, why three? If one had been selected to attend all hearings we would have counsel insinuating that Black secured a judge he could use and influence. He would be saying why did he not call in other judges instead of always having the same one. He does not suggest that in any of the proceedings the judges did anything that was not proper or not in accordance with law. Counsel cannot and does not point to anything that the judges did that any other judge would not have done. Counsel complains that Black as judge of the Superior Court approved the selection of a judge *pro tem*.

Rem. & Bal. Code of Wash., Sec. 40, says: "A case in the Superior Court of any county may be tried by a judge *pro tempore*, who must be a member of the bar agreed upon by the parties litigant, or their attorneys of record, approved by the Court and sworn to try the case."

Counsel when he complained that Judge Black approved the selection made by the attorneys must have known that the judge *pro tem* would have had no power to act unless he was approved by the judge of the Superior Court. (Tr. 106, 130, 131.) We wonder if counsel thinks he is entirely fair with the Court. Black being judge and also trustee, although he knew of no defense, acted wisely in employing an attorney to defend in order to avoid criticism. We are sure that if he had not done so counsel for appellant would now be claiming that he should have done so. But, say counsel, Black employed the attorney for plaintiff. The uncontradicted evidence is exactly the opposite. (Tr. 109.) Black and Bell "locked horns" over the question of the foreclosure of the mortgage. Bell wanted to bring suit. Black opposed it and threatened Bell to make it very expensive. He asked for time and promised if time was given not to make proceedings expensive. Time was given, when it expired and Black could do nothing to raise money Bell wrote Black to give him the name of an attorney who would be inexpensive. Bell was a lawyer and prepared his own papers. Black gave him the "name of Sandidge among others." Bell had met Sandidge and remembered him and employed him. (Tr. 109.) Black was merely courteous because he had forced Bell to give him time

to protect the property of the corporation. There could be no wrong in this. Black was a creditor and a stockholder and it certainly was not his duty to make the proceedings expensive for himself as well as the corporation. Black had the moral as well as the legal right to have joined Bell in asking for a receiver in order to protect his claims if he had desired to do so. We contend that instead of doing wrong, as merely hinted by counsel for appellant, Black acted with wisdom and discretion. He was judge it is true, but he did not act in the case. He was a creditor and a trustee, but he employed an attorney to defend. He was manager and service could have been made upon him. Bell caused service to be made upon the president. If service had been made upon Black appellant would now claim that this was done to conceal the bringing of the action from the president and eastern stockholders who had strained relations with Black and to prevent a defense. It is quite evident that Black did everything that anyone could do to avoid just criticism. The Honorable Judge of the District Court truly was justified by the evidence when he found that Black was guilty of no act either "of commission or omission" which did or could injure the Company. (Tr. 80.)

POINT VIII.

In regard to Point VIII we desire to specifically call attention to some of the findings of the lower Court as set forth in its decision.

"The Sunset Mining Company is a corporation organized under and by virtue of the laws of Wash-

ington with its principal place of business at Everett.” (Tr. 75.)

“The majority of the trustees of the defendant company during the time material to this inquiry lived at Glens Falls, New York, where the majority of the stock of the company was held.” (Tr. 75-76.)

“W. H. Baldwin appears to have been the dominating influence by reason of his large stock holdings. Defendant Bell is a lawyer and was the legal adviser of W. H. Baldwin and Ella Baldwin, his wife, and for a time was general attorney for the defendant corporation. He never acted as trustee for the defendant company except for one day in 1904. At this time it seems to have been necessary to enable the company to transact some business to fill a vacancy on the board, and he was elected and continued a trustee for one day. Defendant Black was not present at this meeting and it does not appear that he knew anything about it. On August 3, 1904, the employment of Bell as attorney for the defendant company ended, although thereafter he attended to some legal matters for the company under special employment.” (Tr. 76.)

“The Baldwins advanced and loaned to the defendant company from time to time \$29,384.10, and on February 10, 1905, a mortgage was given by the defendant company to Ella Baldwin to secure the payment thereof. The defendant Black advanced to the company, December 26, 1906, for the purpose of doing its assessment work, \$1,500, and a mortgage

to secure the repayment was thereafter made upon the company property to Black.” (Tr. 76.)

“On March 18, 1907 (evidently 1909), Rudibeck, a stockholder, filed an affidavit on behalf of himself and other stockholders and attacked the indebtedness and charged fraud and collusion. The claims were approved by the Court and ordered paid, the property was sold March 20th to W. W. Black and F. L. Bell, and on March 29th Rudibeck filed protest and objection to the confirmation of the sale. On March 30th L. T. Reed, a stockholder, filed objection to the confirmation of sale. Objection to confirmation was based in substance on the same grounds upon which relief is sought in the complaint.” (Tr. 78.)

“There is no evidence before the Court that there was any collusion between the defendants Black and Bell with relation to any of the conduct of the business of the defendant company, nor is there any evidence before the Court to justify the conclusion that either the defendants Black or Bell had any influence over the board of trustees or exercised any undue influence of any character in any of the proceedings referred to in the complaint. There is no evidence before the Court that any information with relation to the conditions or status of the defendant company's property was at any time withheld from the plaintiff. By the evidence it is shown that the plaintiff was at all times advised of the financial condition and status of the defendant company, knew of every act and thing that was done by the board

of trustees, and that he was advised more than a year prior to the institution of the foreclosure action that the company was without funds and he was requested to contribute as a stockholder to the fund in connection with the other stockholders for the purpose of relieving the financial stress of the defendant company and doing the assessment work, and he declined to contribute anything and stated that none of the stockholders would contribute. The plaintiff requested the defendant Bell to foreclose his mortgage more than a year prior to the time when foreclosure proceedings were instituted, and that he be given an opportunity to sell the property. He also asked the defendant Black to use his influence with defendant Bell to secure a foreclosure." (Tr. 78-79.)

"Defendants Black and Bell since acquiring the property have expended in assessment work on the mining claims approximately \$25,000. There is no direct evidence before the court as to the value of this property as mineral land." (Tr. 79.)

"There is no evidence presented which would justify any court in finding that there was any manipulation of the defendant company's property by the defendants Black and Bell, which injuriously affected it. So far as the evidence disclosed there was no act of commission or omission on the part of either of said defendants which was intended to or did injuriously affect the defendant company." (Tr. 80.)

Counsel attempts to assign error as to "collusion" (Assignment I), but that is not broad enough to assign error to the finding that there was no act, etc., "intended to or did injuriously affect the defendant company." It can surely be said that appellant did not specifically assign error to the foregoing findings. If he did not he cannot now object and the findings surely sustain the judgment of dismissal. These findings are binding upon the parties on appeal.

These findings are also fully sustained by the uncontradicted testimony as shown by the transcript pp. 92-111.

POINT IX.

The chief case cited by the appellant as an authority denying the right of defendants Black and Bell to purchase the property at the receiver's sale is Coombs vs. Barker, et al, 74 Pacific, 1. This case is clearly distinguishable from the case at bar. In that case the directors had allowed judgments to go against their corporation and its property to be sold at execution sale without making any effort to borrow money to redeem, and without giving the shareholders an opportunity to raise money to pay its obligations. Upon the other hand, one of the directors individually, and the others inferentially, discouraged the shareholders from making any effort toward redemption. They allowed the period of redemption almost to expire, when one of the directors, as a creditor of the company, brought suit two days prior and had judgment entered against the company two days prior to the expiration of the period of redemption, and then

used that judgment as a basis upon which to redeem from execution sale, said redemption being made for the benefit of four of the directors, who afterward formed a new corporation which took over the title thus gained and worked the mine at a great profit, the facts being in every equitable element different from the case at bar, but in its opinion the court clearly and explicitly gives its assent to the doctrine for which we contend. The court uses the following language:

“Counsel for defendant directors cite many cases to the proposition that under certain circumstances the directors of a corporation may become its creditors and enforce their claims against the corporation as any other creditors. We have no inclination to dispute this doctrine, but agree with it as being for the best interest of the corporation. This doctrine, however, is based upon a contract relation between the directors and the company whereby the debt is created and is allowed, because directors of a corporation are more familiar with the business and affairs of the corporation and its necessities than outsiders, and that it would be extremely unjust not to permit them to assist the corporation in financial troubles. When directors become creditors in this manner they may enforce their claims by the same methods as any other creditor.

“Counsel further cites numerous cases holding that a director may become a purchaser of corporation property at a judicial sale when such sale is made by another creditor, and when the director has no control over the proceedings.

“We also agree with this doctrine subject to the qualification, however, that the acts of the director must be fair and honest, and he be not permitted to obtain any dishonest advantage over the corporation or shareholders.”

The rule, as above stated, with the qualifications, is the harshest rule contained in any of the authorities. Even by this, the harshest rule, Black cannot be held liable in this case.

The appellant's own case recognizes the right of Black to become the corporation's creditor in the above matter. It recognizes Bell's right to become a creditor, and it also recognizes their right under those circumstances to become purchasers at a judicial sale.

The court in *Coombs vs. Barker*, *supra*, seems to have placed its decision very largely upon the fact that the directors gave no explanation or justification of their conduct, using this language concerning them:

“They sit by silently and say nothing, and this court, under the circumstances detailed, cannot say that their acts were bona fide and such as to maintain their position.”

The next case cited by appellant, *Fagan vs. Stuttgart Normal Institute*, 127 Southwestern, 404, is clearly not in point, for in that case the defendant director had purchased the property of the corporation when he was not a creditor himself, and when his purpose was not to protect the corporation but to protect another creditor. As

between the corporation and a creditor certainly the duty owed by the director was to the corporation.

The case of *Smith vs. Pacific Vinegar Pickle Works*, 78 Pacific, 550, is not in point, for in that case the president of the corporation, whose actions are called in question without authority from and without the knowledge of the directors, endorsed the notes of the corporation to himself and then made statements to the directors which concealed from them the true facts. The decision in that case is based upon the fact that the president of the corporation was taking its notes and concealing the fact from the directors.

Neither is the case of *Billings vs. Shaw*, 103 Northeastern, 142, in point. In that case the defendant director secretly made an agreement with a third party holding obligations of the company, by which the director secretly secured a very great discount. The corporation by vote of all of its directors, thinking it was dealing with the creditor himself, and not with the defendant director, made a certain assignment in payment of the obligation. A large part of the consideration was then secretly obtained by the defendant director. This case holds, what no one will dispute, that the rule is plain that a director cannot sell his property to a corporation secretly so as to make a profit, nor can a director buy in the debts of a corporation at a discount and, without disclosing his interest, have the corporation pay him indirectly in satisfaction of the debt an amount large enough to give him a profit.

The case of *Parsons vs. Tacoma Smelting Co.*, 25 Washington, 492, cited by appellant is not in point. In that case the directors of one smelting company had leased its property, to the injury of a minority stockholder, to another smelting corporation having substantially the same directors. Such a transaction is not in any of its elements analogous to the facts in the case at bar, because in the *Parsons* case the directors were by virtue of their office leasing to the injury of minority stockholders the property of their corporation, and not undertaking to continue the business of the corporation.

The case of *Collins vs. Hoffman*, 113 Pacific, 625, does not support appellant's contention. In that case the manager and secretary of a corporation purchased its real property at a delinquent tax sale when the corporation and its grantee were ignorant of both the non-payment of taxes and the issuance of the certificate of delinquency. Until the corporation had an opportunity to pay the taxes and knew that the property was to be sold an officer of the corporation acting secretly as in this case, who became a purchaser under such circumstances, would suggest fraud.

THAT A DIRECTOR MAY BUY THE PROPERTY OF A CORPORATION AT A JUDICIAL SALE IS ESTABLISHED BY THE FOLLOWING AUTHORITIES:

“In order to avail himself of the security which he may have taken for bona fide advances made to the corporation, a director may purchase property at a sale under the deed of trust, by which he is secured, or other judicial or public sale.”

10 Cyc. 816.

See also Thompson on Corporations, Second Edition, Section 1253.

The leading case upon the right of a director to purchase, which is practically on all fours with the case at bar, except that the equities in favor of the appellees are much stronger in the instant case than in the one cited, is *Twin-lick Oil Co. vs. Marbury*, 91 U. S., 587. The second and third syllabi give an index to the case:

“2. But one director among several may loan money to the corporation when the money is needed, and the transaction is open and otherwise free from blame, and he may buy at a sale under a mortgage given by it to him to secure the money loaned, if the sale was a fair one.

“3. A bill to avoid such a sale must be brought within a reasonable time.”

The following from the opinion in this case gives the reason that directors should be given an opportunity to protect their claims:

“While it is true that the defendant as a director of the corporation, was bound by all those rules of conscientious fairness which courts of equity have imposed as the guides for dealing in such cases, it cannot be maintained that any rule forbids one director among several from loaning money to the corporation when the money is needed, and the transaction is open and otherwise free from blame.

No adjudged case has gone so far as this. Such a doctrine, while it would afford little protection to the corporation against actual fraud or oppression, would deprive it of the aid of those most interested in giving aid judiciously, and best qualified to judge of the extent to which it may safely be given."

Further quoting:

"If it be conceded that the contract by which the defendant became the creditor of the company was valid, we see no principle on which the subsequent purchase under the deed of trust is not equally so. The defendant was not here both seller and buyer. A trustee was interposed who made the sale, and who had the usual powers necessary to see that the sale was fairly conducted; and who in this respect was the trustee of the corporation, and must be supposed to have been selected by it for the exercise of this power. Defendant was at liberty to bid, subject to those rules of fairness which we have already conceded to belong to his peculiar position; for, if he could not bid, he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money. Nothing was left to the defendant but to buy it in, as no one would bid the amount of his debt."

The Court further lays down the principle, "that in an action to establish a constructive trust delay in bringing the action will defeat relief."

And the court in this case lays down the principle that in mining property a much shorter time will con-

stitute *laches* upon the part of the complainant than with property of stable and settled value. The reason of the rule is that the value of mining property is speculative and contingent. It is stated by the court in the following language:

“While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvements, and but little change in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them.

“The case before us illustrates these principles very forcibly. The officers, and probably all the stockholders, who were not numerous, knew of the sale as soon as made. As there was no actual fraud, they knew all the facts on which their right to avoid the contract depended. They not only refused to join the defendant in the purchase when that privilege was tendered them, but they generally refused to pay assessments on their shares already made, which might have paid this debt.”

The last paragraph recites the facts that are proven by the uncontradicted evidence in the case at bar.

In *Saltmarsh and Others vs. Spaulding, et al*, 17 N. E., 316, the court say:

“A director of a corporation is not prohibited from lending it moneys when they are needed for its

benefit, and the transaction is open and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee under a deed of trust, executed to secure a payment of them invalid." Case cited.

"It is proved, as a fact, that the sale was made in good faith to the highest bidder, and that in making the purchase the tenants were in fact acting in good faith. The law does not require that from their relation to the company the contrary necessarily is to be implied."

17 N. E., 316.

The principle that a trustee purchasing corporate property at a receiver's sale is in a different relation to the company than if he purchased at an ordinary judicial sale, is establish in *Janney, et al, vs. Minnesota Ind. Expo., et al*, decided May, 1900, and reported in 82 N. W., 934. The court said:

"The facts of this case bring defendant within the exception to the general rule that directors cannot purchase the property of the corporation for their benefit. The title, possession and control of the property were in the hands of an officer of the court (the assignee) and had been for nearly a year prior to the sale. The sale was made by direction of the court and subject to its confirmation. The plaintiffs had no control over the property or the assignee, who was the representative of the corporation, its creditors and its stockholders. They had no power

to prevent or control the one brought about by the court through its officers. They had material interests to protect by bidding at the sale. They purchased in good faith at the best price obtainable. The appellants had notice of the sale and did not object thereto until long afterward. See *Pinkus vs. Linen Mills*, 65 Minn., 40; 67 N. W., 643. The sale was fairly conducted and was confirmed by the court. There were twenty-one directors at the time besides the plaintiffs. These facts justify the conclusion of the trial court to the effect that the plaintiff in purchasing the property to protect their own interests did not violate their duties to the corporation." We cite to the same effect as the cases last quoted,

New Memphis Gas Light cases, 60 S. W., 206:

Wheeler vs. Abilene Nat'l Bank Bldg. Co., 159 Fed. 391.

Marks vs. Merrill Paper Mfg. Co., 188 Fed. 850.

Ryan vs. Williams, 100 Fed., 172.

Burnes vs. Burnes, 137 Fed., 781.

Cowell vs. McMellin, 177 Fed., 25.

Marks vs. Merrill Paper Mfg. Co., 203 Fed., 16-19-20 (Jan., 1913).

Harpending vs. Munson, 91 N. Y., 650.

Allen vs. Gillett, 127 U. S., 589-596.

Duncomb vs. N. Y. H. & N. R. R. Co., 84 N. Y., 190-208.

Leavenworth County vs. C. R. I. & P. R. R. Co., 134 U. S., 688-709.

POINT X.

We know that no hard and fast rule can be laid down to govern a case of *laches*. Courts of equity are sometimes governed by the statute of limitations. If the court is governed by the statute of limitations in this case the action was properly dismissed. See statute of limitations, Transcript pages 11 and 112. Sometimes courts refuse relief in a shorter period than the statute will allow. Laches rest not alone on the lapse of time but on the inequity of permitting the claim to be enforced because of some change in the condition of the property of the parties. (Streets Fed. Equity Practice, Sec. 211.) In the instant case appellant knew all about the affairs of the company; knew the company was insolvent; knew that Bell had threatened receivership proceedings; knew that a receiver had been appointed; knew that the property had been bid in by Bell and Black and so knew before the sale was confirmed; he also knew that the property consisted of mining claims upon which it was necessary to do assessment work and to expend large sums of money in obtaining patents; he knew that appellees were spending large sums of money. Appellees had spent after the sale and during the time appellant was sleeping on any rights he had more than Twenty-five Thousand Dollars upon property that was admittedly not worth more than Forty Thousand Dollars. Buchler knew that this money would have to be spent in order to preserve the title. There certainly was a change in the condition and relations of the property and the parties.

16 Cyc., 150 and 157.

Denton vs. Baker, 93 Fed., 46.

Strand vs. Griffith, 144 Fed., 828.

Twin-lick Oil Co. vs. Marbury, 91 U. S., 887.

Townsend vs. Wandewircker, 160 U. S., 171.

Rothchild vs. Memphis & C. R. Co., 113 Fed., 476.

In this latter case the court held a delay of 17 months to be laches.

Thompson on Corporations, 2nd Ed., 1257.

Leavenworth County vs. C. R. I. & P. Rlwy. Co.,
134 U. S., 709.

In this case Justice Harlan said:

“Courts of equity do not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance or even the want of means of those to whom they were once presented.”

It must be remembered in this case that appellant knew or should have known that appellees were spending large sums of money and necessarily were forced to spend large sums of money in order to preserve the title to the property. See transcript, page 152, 153 and 154, where Bell notified stockholders of the condition of the property and the necessity to spend large sums to preserve title. See Buchler's testimony, transcript page 103, 105. “Exhibit 13,” transcript page 176; “Exhibit 17,” 179. See findings of the U. S. District Court, transcript, page 78.

POINT XI.

The appearance in the receivership proceeding by Rudebeck and Reed, who were stockholders appearing for themselves and other stockholders, as well as the appearance by the corporation itself whereby substantially the things alleged in the bill of complaint were set up in the objections and the judgment of the court we think is *res adjudicata* of all the matters and things complained of by appellant. See Black on Judgments, Vol. 2, Sec. 549.

Willoughby vs. Chicago, etc., Co., 25 Atl., 277.

Hearst vs Putnam, 77 Pac., 753, 758.

Mitchell vs. First Nat'l Bk., 180 U. S., 471, 480.

McEwen vs. Harriman Land Co., 138 Fed., 797.

Intermela vs. Perkins, 213 Fed., 106, 108.

Green vs. Liggett, 135 U. S., 533, 544.

POINT XII.

Appellant should have offered to put the defendants in the same position they occupied before they purchased at the sale, and should have offered to restore to them money honestly and necessarily expended by them in the preservation of the property since that time.

In Mosher vs. Sinnot, 79 Pacific, reading from page 744, the Court says

“The complaint makes no offer to do equity with reference to Mosher and Whipple, nor does the decree make any provision for doing them equity. The

decree simply provides for a cancellation of the certificates of stock held by them under this purchase. The claims of Mosher and Whipple against the corporation are not disputed. They are open accounts. They accrued more than six years ago, and are therefore barred by the statute of limitations. Were we to affirm the judgments of the Lower Court as to these certificates of stock, we would thereby cancel the certificates of stock, and yet not put Mosher and Whipple in the same position in which they were before they received the certificates of stock, the corporation would have back the stock, and at the same time have annulled perforce the statute of limitations the claims of Mosher and Whipple against it. This result would be manifestly unjust. *The complaint failed to state facts sufficient to constitute a cause of action in that it failed to offer to do equity with reference to Whipple and Mosher. The decree was bad in that it cancelled the certificates issued to Whipple and Mosher without requiring the corporation to do equity with reference to their claims.*"

To the same effect is the case of *San Francisco Water Co. vs. Patee*, Cal., 25 Pac., 135, which is an action brought by the corporation in which the defendant was declared a constructive trustee, he having secretly purchased the property of the corporation at tax sales. The court in that case held that Patee was entitled to full payment for all expenditures incurred by him in behalf of the corporation in acquiring the title, although the title was acquired by him secretly. The court held, however, that as to prior claims for salary he would stand in the same

relation as other creditors.

In the case of Coombs vs. Barker, appellant's leading case, the Court said:

"3. As to the amount of the recovery to which the plaintiffs are entitled: There is no doubt but that defendants are entitled to a credit for whatever money they have actually paid out or expended for the use and benefit of the defendant company—such as the money paid by them upon the redemption of the property, in satisfaction of bona fide claims against the property, interest thereon at the rate of eight per cent. per annum from the dates of payment, and also the reasonable expenses of extracting the ore from the property after redemption. The directors of the company, having the management of its business affairs, could have proceeded with the mining operations of the company and mined all this ore at the expense of the company. It is therefore inequitable to allow plaintiffs to recover the value of the ore after extraction, without allowing the defendants the necessary expenses of extraction."

The appellant must offer to do equity with reference to appellees or the decree of the court must make provisions for doing them equity

"Unless the director purchasing the property has acted with such turpitude as to put him in the category of trustee *ex malefacio*, he will be allowed to keep or will have restored to him what he has actually expended. In other words the property will be re-

stored to the corporation on condition of putting the purchaser in *statu quo*."

Mosher vs. Sinnott, 79 Pac., page 744.

San Francisco Water Co. vs. Pattee, 25 Pac., 135.

Wheeler vs. Abellene Nat'l Bldg. Co., 159 Fed.
391.

Burnes vs. Burnes, 137 Fed. 801.

We think the law is well settled that in every case in which a judicial sale is set aside that the purchaser must be placed in *statu quo*, unless he has been guilty of moral turpitude. The evidence in this case shows that the claims of appellees with interest amount to more than One Hundred Thousand Dollars, none of which has been paid. See transcript, pages 106, 110, 137, 138, 139, 140, 148 and 149. It is self-evident that appellees cannot be placed in *statu quo*. It would be a vain and foolish thing for a court to appoint a receiver for Forty Thousand Dollars worth of property when the claims of appellees would amount to more than One Hundred Thousand Dollars, and this would eventually result in giving the property to appellees finally, the only difference it would make is that the receivership would make large expenses, finally and practically coming to be paid by appellees without any benefit to any stockholder.

POINT XIII.

The bill of complaint simply recites that the appellant is a stockholder and nowhere asserts that he brings this suit except to redress his own particular wrong. We think that the law is well settled that an individual stock-

holder in an action like this cannot maintain an action. The only authority for a stockholder to bring an action like this is where the corporation itself refuses to act, then a stockholder in behalf of himself and other stockholders similarly situated may maintain such a suit if due demand for suit is made upon and refusal had from the officers of the company.

Kavanaugh vs. Trust Co., 181 N. Y., 121, 124.

Carson vs. Allegheny W. C. Co., 189 Fed., 791.

If he does not bring the suit for himself and other stockholders he must make the other stockholders defendants.

Snow vs. Wheeler, 113 Mass., 179.

Carson vs. Allegheny W. C. Co., 189 Fed., 791.

POINT XIV.

It seems to us that this proposition requires no extended argument. The Sunset Copper Mining Company was a necessary party to the action, and if for any reason it does not sufficiently appear from the transcript that the Sunset Copper Mining Company was not served in the action in the U. S. District Court then it follows that it is a necessary party on appeal and as no citation was served upon the corporation the appeal should be dismissed for that reason and we hereby ask the Court to dismiss the same.

Farmers' Loan and Trust Co. vs. Longworth, 22
C. C. A., 420.

48 U. S. App., 71.

76 Fed., 610.

Am. Loan and T. Co. vs. Clark, 27 C. C. A., 522.
49 U. S. App., 571.

Hook vs. Merc. T. Co., 36 C. C. A., 645.
95 Fed., 41.

Wilson vs. Kiesel, 164 U. S., 252.

Hardy vs. Wilson, 146 U. S., 179.

POINT XV.

The action brought by Bell in the Superior Court of Snohomish County was not an action to foreclose a mortgage, but an action to have a receiver appointed, because the corporation was insolvent. This is directly authorized by the statutes of the State of Washington. See Rem. & Bal. Code, Vol. 1, Sec. 741, Sub. 5 and 6. See complaint transcript, page 115-118.

POINT XVI.

It is sufficient as to this point to call to the attention of the Court the entire absence of any evidence tending to show any effort on the part of complainant at any time to aid the company or come to its assistance. The evidence disclosed the fact that the company was insolvent and had no assets and that money had been furnished by both appellees Black and Bell with which to preserve the property and that appellant was fully informed as to everything that was done. See transcript, page 106. and findings of Court hereinbefore mentioned.

POINT XVII.

It is obvious that the complainant's remedy is the remedy available to the corporation, because a stockholder

can have no higher or greater right, remedy or interest than that of the corporation itself. This is so plain that we do not deem it necessary to cite authorities in support of the proposition. That a Federal Court of Equity will deny relief to a representative of a corporation as against a judgment rendered against it in the State Court, where such representative had timely notice of the entry of such judgment, is settled in this circuit in the case of *Denton vs. Baker*, 93 Fed., 46.

In the case cited a judgment was fraudulently obtained in a court of this state against a National bank without making the receiver thereof a party. The receiver learned of it a few days later, but took no action in the State Court to contest the judgment. After the expiration within which he might move in the State Court to vacate the judgment for fraud, he filed a bill of equity in the Federal Court, and it was held that he was guilty of laches and that equity would not annul the judgment.

POINT XVIII.

In support of this point it is only necessary to refer to the decision of Judge Neterer (Tr. 79). The evidence supported his finding that appellant invited Bell to foreclose his mortgage nearly a year before the receivership action was instituted. His purpose in the invitation was that Bell might thereby obtain a title that would exclude all minority stockholders from any interest in the corporation, and that the appellant might himself then obtain an option that would give him a profit. (Tr. 109.) Appellant had theretofore secured an option on the majority stock and finding he could not handle it conceived

the idea that he could sell the mining property at a profit. (Tr. 109.) Appellant likewise solicited Black to the same effect (Tr. 106), the disposition of Black and Bell being to hold the property for the corporation and that of appellant being to get the property away from the corporation.

It is a fundamental principle of law that one cannot be heard to complain of any act which he himself invited. It appears to us that no citations or further argument are needed on this point.

POINTS XIX, XX, XXI.

These three points have already been developed in the discusison of previous points. Point XIX was covered largely under the topic of "Laches," Point XX under VIII concerning the decision of the trial judge and IX treating of the right of trustees to purchase at a judicial sale to protect claims against the corporation, and Point XXI has been established in our belief by all of the preceding argument.

DISCUSSION OF APPELLANT'S CHIEF ARGUMENTS.

The appellant in his brief bases his claim that the lower Court erred chiefly upon three grounds. The first, that there was no service upon the corporation and that the appearance of Attorney Locke in the action was unauthorized and that therefore there was no jurisdiction. Second, that the sale by the receivership was void because Bell in his prayer in addition to praying for a receiver and sale of the property also generally prayed for other

relief, including a foreclosure. Third, that the purchase by a director of a corporation at a judicial sale of the corporate property is void.

It seems to us that a careful reading of the statement of facts alone shows that appellant's contentions are baseless as he assumes a state of facts which did not exist, upon which to base his argument. The third leading point of appellant to the effect that the purchase by Black and Bell was void because Black was a trustee has been answered by our argument under Point IX in which the cases cited by appellant have been shown to have been decided upon a very distinct state of facts from the case at bar.

Answering Claim of No Authorized Appearance.

In regard to the effect of an unauthorized appearance by an attorney, the appellant in his brief at page 27 cites:

Shelton vs. Triffin, 6 How., 162, 186.

Hatch vs. Ferguson, 57 Fed., 959, 971.

Dormitzer vs. Germ. Sav. & L. Co., 23 Wash., 195.

He argues from these cases that Locke's appearance in the cause gave no jurisdiction. The cases cited by counsel have absolutely no bearing on the cause at issue. All of appellant's cases are to the effect that if the defendant was not served and gave his attorney no authority to make an appearance that the unauthorized appearance would not give jurisdiction. But the Sunset Company was served with summons and complaint upon the presi-

dent of the corporation, who admitted due and timely service and the Court's orders and decree recited due and regular service. Likewise Attorney Locke, as the evidence shows, was employed to appear for the company and did appear a number of times.

In the case of *Shelton vs. Tiffin*, 6 How., 162, cited by appellant, there were two defendants. The case was brought in Louisiana and one of the defendants was in Missouri. The attorney Perry authorized to appear for one of the defendants inadvertently appeared also for the defendant living in Missouri without authority. The Court says at page 184:

"No process was served upon L. P. Perry of Missouri, nor does it appear that he had notice of the suit until long after the proceedings were had.
* * * And Crawford, the attorney, testified that he had no recollection of having received any authority directly or indirectly from L. P. Perry or from any one in his behalf to defend the suit.
* * * And he says that he regards his appearance on behalf of any other person than John M. Perry in said suit as an inadvertance on his part. This evidence does not contradict the record, but explains it. The appearance was the act of counsel and not the act of the Court. Had the entry been that L. P. Perry came personally into court and waived process, it could not have been controverted."

We call the attention of the Court to the fact that in this case cited by appellant it was held that a recital by the Court cannot be controverted.

The case of Hatch vs. Ferguson, cited by appellant, is merely to the effect that an unauthorized appearance for minor defendants does not bind them.

In the case of Dormitzer vs. Germ. Sav. & L. So., 23 Wash., 195, the Court decided at pages 201 and 202 that the defendant who was not within the state had never been served with process, and that the divorce was fraudulent because neither the plaintiff nor the defendant was domiciled in the state in which the divorce was given. The appearance of the attorney was an unauthorized appearance as far as the defendant wife was concerned. The decision of this case on appeal at 192 U. S., 125, did not take under consideration the matter of an unauthorized appearance by an attorney but decided that the divorce action was void because neither party was domiciled in the state where the divorce was granted.

The other cases cited by the appellant are likewise ones where no service was had and an attorney appeared without any authorization.

While it does not appear in the transcript the inference is clear that McNutt, president of the Sunset Copper Mining Co., asked Black to secure an attorney to appear in the action. And this inference is in conformity with the fact.

CONCERNING JUDGE PRO TEM.

Appellant's brief at pages 20, 21, 22 and 23 concerns itself with the fact that Black as judge approved the selection of F. E. Anderson as judge *pro tempore*. No attempt is made by the appellant to prove that F. E. Anderson was not a proper and impartial judge nor was any

attempt made to show that he did not act correctly in the premises nor that this Court having the same case before it would not have acted exactly as did he.

Appellant on page 20 cites an extract from Sec. 40 of Rem. & Bal. Code and Statutes of Washington in an unfair attempt to make this Court believe that Judge Black's approving of the appointment of F. E. Anderson was not only a breach of propriety, but was also contrary to the laws of the State of Washington. The extract quoted occurs within Sec. 40, but that extract does not end with a period as cited by appellant, but that phrase ends with a comma and is immediately followed by this phrase, "approved by the Court." The counsel for appellant knew that Black was the only judge of Snohomish County and that he was required by law to approve the appointment of a judge *pro tempore*. The evidence in this case shows that the parties litigant in the Snohomish County proceeding by their attorneys did agree in writing as provided by law for the appointment of Anderson.

Answering Claim of Invalidity of Receivership.

The appellant contends the Court had no power to appoint a receiver and that the sale was void, in the face of appellant's attempt to apply a constructive trust upon the title of the appellees, and in the face of the fact that the Washington law provides for the receivership of a corporation because of insolvency or imminent insolvency.

The appellant in the Court below while first praying that the Snohomish County proceedings be declared

void later amended his prayer by striking out that portion (Tr. 23) and in a brief to the Court below, dated February 2nd, 1914, on page 15, which is incorporated in appellant's brief on final hearing before the trial Court appellant made this conclusive statement:

"In the first place complainant is not demanding that the judgment entered in the Superior Court of the State of Washington for Snohomish County, be vacated, annulled and declared void. He is asking that a constructive trust be impressed upon the property in question in the hands of defendants, Black and Bell."

In defiance of appellant's amendment of his prayer below, and the assertions of his counsel orally and in brief in his behalf, appellant now contends that the Snohomish County Superior Court proceeding was void. Appellant, however, ignores the fact that the Snohomish County proceeding was an action brought for the appointment of a receiver upon the allegation that the Sunset Copper Mining Company was insolvent, owing a large amount in addition to the mortgage owned by Bell. And Bell, in that action, prayed that the receiver sell the property to pay not only his claims, but the claims of the corporation. The cause likewise was carried through as a receivership under the laws of the State of Washington, and Bell presented his mortgage merely as a claim against the receiver. This he had a right to do. The prayer for a foreclosure of the mortgage was merely a portion of a general prayer for other relief following the specific prayer for appointment of a receiver and the sale of the

property to pay the debts. The portion of the prayer concerning the foreclosure was merely verbiage and did not change the receivership proceedings.

Rem. & Bal. Code of the State of Washington, Sec. 740, provides:

“A receiver is a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, or upon a judgment, decree, or order therein, and to manage and dispose of it as the Court or officer may direct.” and Sec. 741 provides:

“A receiver may be appointed by the Court in the following cases:

“1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim;

“3. In all actions where it is shown that the property, fund or rents and profits in controversy are in danger of being lost, removed or materially injured;

“5. When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;

“6. And in such other cases as may be provided for by law, or when, in the discretion of the Court, it may be necessary to secure ample justice to the parties.”

The Court will note that the property of the Sunset Mining Company was largely chattel, consisting of machinery and unpatented mining claims, and the Supreme Court of the State of Washington has decided that in the foreclosure of a chattel mortgage the appointment of a receiver is proper and the receiver in the foreclosure proceedings may sell the property and pass title.

Libert vs. Unfried, 47 Wn., 182.

Collins vs. Gross, 51 Wn., 516, holds as shown by the syllabi that

“1. A receiver may be appointed pending foreclosure of a real estate mortgage, where it appears that the mortgagors had abandoned the property and left for foreign lands and that a receiver is necessary to care for and protect the property and rent the same during the pendency of the action.”

“2. Bal. Code, Sec. 5516, repealing Bal. Code, Sec. 5456 in so far as it authorizes the appointment of a receiver for mortgaged real property because of insufficiency of the security, does not repeal by implications other provisions for the appointment of a receiver to save waste.

21 Wn., 32, likewise holds that a receiver is permissible to prevent waste.

Appellant, however, mistakes the law governing the remedies of a holder of notes secured by a mortgage. The holder of notes secured by either chattel or real estate mortgage, under the general rule and under the decisions

in the State of Washington, has his choice, either to foreclose his mortgage or else to treat the debt as an ordinary debt and sue on the claim.

Frank vs. Pickle, 2 Wash. Terr., 55, states in its syllabus:

“If a written instrument constitutes both a promissory note and a mortgage, the holder, at his option, may recover a money judgment upon it, as a promissory note, or proceed to foreclose.”

Frye vs. Meyer, 22 Wn., 277, likewise holds that the holder of note and mortgage may, at his option, treat the same as an ordinary debt, or may foreclose the mortgage.

In the Superior Court case of Bell vs. Sunset Copper Mining Company, complained of by appellant, Bell saw fit to present his notes and mortgage as a claim to the receiver as he had a perfect right to, instead of foreclosing his mortgage and cutting out other creditors. In fact Bell suffered his claim, secured by a mortgage, to be adjudged subsequent and inferior to claims of other creditors.

None of the cases cited by appellant concerning this point are applicable, as they are merely to the effect that under certain conditions when the action is entirely a real estate mortgage foreclosure that a temporary receiver cannot be appointed in order to apply the rents to increase the security.

Appellant's case of *Norfor vs. Busby*, 19 Wn., 450, is solely to the effect that a receiver cannot be appointed in a straight mortgage foreclosure on real estate to deprive the mortgagor of the rents before foreclosure to make up an insufficiency of security. In the case already cited by appellees, to-wit: *Collins vs. Gross*, 51 Wn., 516, the Court held that the case of *Norfor vs. Busby*, 19 Wn., 450, only decided that a receiver cannot be appointed to take charge of property before the foreclosure so as to apply the rents to make up an insufficiency of the security. The Court in *Collins vs. Gross* stated that:

"The appointment of a receiver to care for, protect and rent the property during the pendency of the foreclosure proceedings" was authorized to prevent waste.

It appears to us that appellant's contention that a receiver cannot be appointed in the action by Bell in Snohomish County in which he prayed for the appointment of a receiver for the purpose of preventing waste and on account of the insolvency of the company, and that the receiver should sell the property to pay the debts, is neither supported by authority nor reason. And appellant's contention in this respect is certainly academic for if sustained it could only defeat his action to establish a constructive trust upon a title which he now seeks to say does not exist.

The deciding feature that the receivership proceedings in the Snohomish County Court was proper and as provided by law, and that the receiver's sale of the corporate property passed title to the purchasers, is the

fact that the Sunset Mining Company was alleged in the complaint to be insolvent and the proof in the Snohomish County proceedings was to the same effect, and the Superior Court of Snohomish County on a hearing adjudicated the insolvency of the Sunset Copper Mining Company. In addition the evidence produced in this case in the District Court before Judge Neterer likewise proved that the Sunset Copper Mining Company was insolvent and that its debts exceeded its assets by a very considerable amount.

The appellant's brief at page 38 seeks to mislead the Court as to the prayer of Bell in his Snohomish County proceeding insinuating that the only prayer of appellee Bell was that a receiver *pendente lite* be appointed to care for the property until the sale of the premises under the mortgage. In the transcript, however, page 118, occurs the following extract from the prayer of Bell's action:

"and that the receiver be authorized and directed to sell the whole or such portion of said property as may be necessary in order to pay the indebtedness of said company," and "and for the payment of all debts and obligations of said company or of the receivership,"

Irregularities Not Important on Collateral Attack.

We wish to call the attention of the Court to the fact that all of the alleged irregularities complained of by appellant, would, if true, be merely such irregularities as would permit an Appellate Court on appeal in the same proceeding to modify the decree if it saw fit. But none of the established irregularities, even if established, are such as to allow collateral attack upon the judgment in another

proceeding. It would seem to us that appellant having been guilty of most glaring errors and irregularities in not having served the Sunset Mining Company in this action nor made it a party to the appeal would be reluctant instead of anxious to try his cause upon the most precarious of technicalities.

Regarding Laches and Limitations.

Appellant in his brief, pages 63-70 inclusive, argues that the Federal Equity Courts are not bound by State Statutes of Limitation. But while the Federal Equity Courts are not bound they are prone to follow same by analogy. To this effect we cite:

Simpkins, a Federal suit in equity, 277.

Merrill vs. Town of Monticello, 66 Fed., 165.

Cooper vs. Hill, 94 Fed., 522. ...

Beaubien vs. Beaubien, 23 How., 190.

25 Cyc., 1155-1165.

The Statutes of Limitation of the State of Washington affecting this action are shown in the transcript pp. 111, 112. Appellant's brief, page 69, states that Sec. 159 of R. & B. Code of Washington provides for the bringing of an action based on fraud within Three years. Said Sec. 159 reads as follows: ...

"Sec. 159. Within three years. * * *

4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the

aggrieved party of the facts constituting the fraud.”

It clearly appears that the said action must accrue within the three years discovery of the real fraud, not within three years after the confirmation of a sale. Appellant’s testimony, Tr. pp. 104, 105, shows Buchler to have knowledge of all the things complained of long before the confirmation.

The cases hereinafter cited, however, by us, conclusively show that an action to impress a constructive trust is not an action for relief based on fraud. The Washington Statute of Limitation applying to the instant case is Sec. 165 of Rem. & Bal. Code and Statutes, reading as follows:

“Sec. 165. ...

An action for relief not hereinbefore provided shall be commenced within two years after the cause of action shall have accrued.”

... The Federal Courts of Equity follow by analogy the state statute. Of course, in the case at bar, no extraordinary conditions exist. Black especially fulfilled his every obligation, and the closest scrutiny of his acts shows that he was at all times endeavoring to his utmost to protect the interests of the minority stockholders, and that instead of being the controlling factor of the corporation, that he was at all times a minority stockholder, never having more than eighty thousand (80,000) shares of stock, and that the Baldwin stock saw to it each year that a majority of the trustees resided in New York. Had Black contented

himself with a mere fulfillment of his obligations to the corporation and the minority stockholders, the property and assets would have been lost to the corporation, and the stockholders, many years prior to 1909. And so if there be any reasons for this Federal Court sitting in equity, not following by analogy the State Statute of Limitations, it would be, as certain of appellant's citations suggest, that the court would hold that a delay of a shorter period than that stated by the statute, would bar relief.

If complainant's action be one to annul and vacate a judgment of the Snohomish County Superior Court, it would appear that the one year statute is applicable according to the decision of *Denton vs. Baker*, 93 Fed., 46. The authorities are conclusive that an action to establish a constructive trust is not an action for relief on the ground of fraud, but is such an action as would come within the language of Section 165, Rem. & Bal. Code of Washington, holding actions for relief not otherwise provided for, barred within two years. In support thereof we cite:

Wagner vs. Law, 3 Wash., 517.

French vs. Woodruff, 54 Pac., 1017.

Missouri Savings and Loan Co. vs Rice, 84 Fed., 131.

Ferris vs. Wirt, et al, 66 Pac., 946.

Chapman vs. Bank of Cal., 31 Pac., 896.

Keney vs. Parker, et al, 79 Pac., 556.

Hecht vs. Slaney, 14 Pac., 88.

Piller vs. Southern Pacific R. Co., 52 Cal., 42.

The California cases, the last five, are construing Section 343 of the California Code, which reads as follows:

“An action for relief not hereinafter provided for must be commenced within four years after the cause of action which have accrued.”

The tenor of the above cases is to the effect that actions to establish trusts are not actions for relief upon the ground of fraud.

It is patent that an action to establish a constructive trust comes within the purview of the two-year statute for other relief, as there is no other statute of limitations touching upon such an action.

It appears that more than three years elapsed between the sale to Black and Bell and the bringing of appellant's action. We respectfully submit that appellant's cause of action is stale; that the Court should deny him any relief, because of laches, and that the two-year statute of limitations should be applied as a bar by analogy.

CONCLUSION

In conclusion we desire to call the Court's attention to the fact that this is a suit in equity. An Equity Court is for the purpose of giving relief from the harsh and rigorous technicalities of the law instead of resorting to technicalities to defeat justice and one of the governing principles is that, “He who seeks equity must do equity.”

The evidence discloses that the appellant, Buchler, had every opportunity to examine the books and records

and he exercised that opportunity, purchasing an option on the controlling stock interest and on the mortgage debts of the Company which Bell afterward presented to the receiver in the receivership proceeding. Appellant and all other stockholders had an opportunity of relieving the financial distress of the Company by loaning to the Company their pro rata of the expenses for doing assessment work and patenting the claims; Bell and Black agreeing to forbear pushing their claims for advances previously made. Neither he nor any other stockholder would do anything to protect their interest. After the sale had been confirmed appellant and other stockholders were given an opportunity by Black and Bell to join with them in the ownership of the property by paying their pro rata of the sum bid by Black and Bell. Neither would they do this.

There is no evidence as to the value of the mining property and from all the evidence offered it would seem unprofitable to mine ore. So that it appears that even now, after appellees had spent \$30,000.00 additional after the sale, the value of the property is still speculative and there is no indication that it could be sold for \$40,000.00 now, much less \$110,000.00, which is the total investment of appellees in holding and improving and doing the work connected with patenting the property.

In the face of this, appellant Buchler, who would do nothing to assist in saving the property, who is estopped by solicitation of the act he complains of, who is guilty of laches, and who openly disclaims any intention of doing equity through remunerating appellees for necessary expenditures, seeks now in this Court of Equity to add a fur-

ther burden in the form of a large attorney fee in this cause together with the cost of a receiver and counsel fees connected therewith and make same a first and prior lien on this property. To sustain appellant's position will neither profit him nor any other stockholder and will only injure appellees through wasting the property in attorney and receiver fees.

Appellees are the only people who tried to and who did protect the property. They went far beyond the requirements in preserving the property for the corporation and stockholders, and when their means would no longer permit them to carry the corporation, and when the sale had been made and confirmed, instead of attempting to freeze the stockholders out, they did what the law did not require them to do and what no other person probably would have done under the circumstances, giving the stockholders a right to put up their share, not of the whole debt, but of the bid.

An Equity Court under such circumstances will not give the property substantially to attorneys for the appellant, especially when the appellant has never done anything to aid but always to annoy and make trouble.

The matter involved in this action is all *res adjudicata*: appellees had the right to purchase the property to protect bona fide advances; the equities are with Black and Bell; and appellant is barred by laches, estopped by solicitation, and stating an intention to do inequity in effect evicts himself from a forum of Equity. In addition appellant's action and appeal are fatally defective because

of his failure to make the corporation a party by service and by ignoring the corporation on this appeal.

Appellant does not rely upon equity but wholly upon the harshest kind of technicalities, and as we have shown in our brief one not sustained by any facts in the cases cited by them.

We submit that this Court should, without any hesitation whatever, dismiss the appeal at the cost of appellant.

... Respectfully submitted,
 W. W. BLACK, for himself, and
 ROB'T. McMURCHIE and
 L. L. BLACK,
 Solicitors and Counsel for
 Appellee Black.

2572

No.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

G. J. BUCHLER,
Appellant,

vs.

W. W. BLACK, FRANK L. BELL
and SUNSET COPPER MINING
COMPANY, a corporation,
Appellees.

APPELLEES' BRIEF

*Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.*

FRANK L. BELL,
*Solicitor and Counsel, in person, for
Defendant Bell,*

Glens Falls, N. Y.

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BRIEF FOR APPELLEES.

*Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division.*

This case is brought into this court on a writ of error (page 191). The action is in equity by a single minority stockholder suing individually to impress a constructive trust upon thirty-six unpatented mining claims located in the State of Washington, on which applications for patents have been made by the defendants Black and Bell, also one-half of a section of land which is wholly within the area covered by the patents applied for (page 5).

This action was commenced March 27, 1912, (page 21) and came on for trial before Judge Neterer at Seattle on April 12, 1914 (page 93), and resulted in a dismissal of the action (page 88).

Plaintiff's bill is founded on fraud and collusion and the allegations on which he seeks relief are briefly as follows:

That in the year 1903 the defendant Corporation had a capital stock of two million dollars divided into two million shares of the par value of one dollar each (page 4). That in said year this stock was wrongfully increased to three million shares and a large part of these shares issued to one W. H. Baldwin at two and one-half cents per share, although he agreed to pay ten cents per share. That this increase was void and the issue thereof to Baldwin was void (page 6).

That between the years 1902 and 1906 in a scheme to defraud the minority stockholders and to convert the assets of the Corporation to the use of said Black and Bell they, with said Baldwin and one McNutt, caused the said Sunset Company to issue to one Ellen C. Baldwin, eight notes amounting to \$29,384.10, and to secure them by a mortgage on the property of the corporation. That the notes were without consideration (pages 7, 8). It is not charged that any of the persons named were trustees of the corporation except said Black.

That in the year 1908, said Black with one McNutt, one Sellingham, one Davis and one Metzger were made trustees of the Sunset Company, the said W. H. Baldwin having died previous to the meeting (pages 8, 9). So

far as the complaint or proof shows these men have continued to be such trustees to this date.

That in the month of May, 1908, said Bell became the owner of said notes and mortgage and 1,250,000 shares of the stock of the Sunset Company, and conspiring with said Black to convert the assets of the corporation to their use, Bell on November, 1908, brought an action in the Superior Court, Snohomish County, Washington, (page 9), alleging that the corporation was insolvent and unable to pay its debts, that it owned mining claims of value and was without funds and could not borrow money to do the assessment work for the year 1908. That unless such work was done said claims would be forfeited and asked the appointment of a receiver to protect the property, and if necessary to sell such property. That the summons was served on McNutt, as president in New York State, and D. W. Locke, an attorney, appeared in the suit for the Sunset Company, but said Locke did not make a bona fide defense or investigate the merits of the case (page 10). There is no allegation that Locke was not authorized to appear or that there was fraud about his employment or that Bell as plaintiff in the action ever knew of the appearance.

That Locke did not have proper authority to appear; that he allowed a claim of said Bell for \$10,000.00 and judgment for the notes and interest in sum of \$37,501.75. That the corporation was adjudged insolvent, a receiver appointed and its property decreed to be sold to pay the judgment and debts, to none of which said Locke objected. That there was no proper service on the corporation and the proceedings were void. Further that they were part

of a collusive and fraudulent scheme of Black and Bell to get control of the assets of the company (page 11).

That the time the receivership proceedings were pending said Black was the presiding judge of the Court in which the action was brought, and he called in divers judges to hear the case to the end that such judges would not discover the collusive and fraudulent scheme of Black and Bell (pages 11, 12).

That said Bell filed with the receiver a judgment recovered in the District Federal Court of New York State against the Sunset Company for \$12,767.57 which was void because said company had never complied with the laws of New York State permitting it to do business therein and service upon it in said state was void (pages 12, 13).

That Black filed with the receiver a claim for \$10,923.21 which was illegal and exorbitant (page 13). That the total debts proved against the corporation amounted to \$64,000.00 (page 13).

That after the receiver was ordered to sell D. Rudebeck, a minority stockholder, made a motion to postpone the sale, alleging that the claims presented to the receiver were invalid and money was owing the company which would pay its debts, and other matters which complainant alleges in his bill here, but the motion was denied (page 14).

That the property sold for \$40,000.00 of which \$2,000 was paid in cash and balance by cancellation of prior liens. That the value of the property exceeds \$40,000.00 (page 16).

That since Bell acquired his stock he and Black have owned a majority of the outstanding stock and are in control of the corporation, and to convert its property have mismanaged the company, etc.

The original bill asked that the receivership proceedings in the State Court be set aside as void (page 17) but after the case had been pending for some time on motion of plaintiff this relief was stricken out (page 23) so the bill now stands as asking that the receiver's sale be set aside (page 18) and that it be decreed that Black and Bell hold title to the property as trustees for the corporation and its stockholders (page 18).

The plaintiff therefor appears here in the anomalous position of asserting that Black and Bell have no title and asking that a constructive trust be impressed on something that does not exist.

Service was not made in this action on the Sunset Company and it is not a party.

Upon the trial the plaintiff failed to prove a single collusive, fraudulent or wrongful act on the part of Black and Bell or any allegations of wrong alleged in his bill. On the contrary the defendants clearly established that there was no wrong, and that their whole conduct had been fair, honest and just. Upon the trial the plaintiff did not even deny that he was complaining about things which he had asked Black and Bell to do and that they had refused to be parties to his wrongful demands. The action was properly dismissed and the judgment should here be affirmed.

POINTS.

I.

The Corporation appeared by Attorney in the action in the State Court: This conferred jurisdiction and the judgment there rendered cannot be attacked collaterally and Plaintiff's only remedy is by motion in that action.

Under Rule 11 of this court no alleged error will be regarded, unless pointed out in the assignment of errors. Although plaintiff's bill makes mention of the above point we submit that the assignment of errors does not. The only reference to the State Court proceeding is in VIII of said assignments (page 192) which says the court erred in holding valid the proceedings wherein the assets of the corporation were sold by the receiver. No intimation is made that the State Court did not have jurisdiction of the action, or the parties or the subject matter. The term "proceeding" does not refer to the beginning of an action, but to a step in the action; properly considered it can refer only to the papers upon which the receiver asked for the sale and the order of sale. There is no averment in the bill that service was not made on the corporation in the State of Washington. Black was a trustee and general manager of the company (page 7) and he employed Locke to appear for the corporation (page 95). The order appointing the receiver recited "that due and legal notice" was given the corporation (page 125) and the decree recited the appearance of Lock, as attorney, (page 131).

We deem it unnecessary to cite authorities to the effect that these recitals are entitled to full credit, unless

the records shows that service was not so made. Both Black and Locke were witnesses for the complainant and neither were asked the question, and there is no proof in the case bearing thereon. As complainant is attacking the judgment the burden was upon him and as he made no attempt to make this proof the defendants were not called upon to prove the regularity of the proceedings. The presumption therefore is that service was made as above recited. Black did what any prudent man would have done and employed an attorney and removed all grounds for personal criticism.

We assume complainant's counsel will endeavor to make something of what he did show, and even this avails him nothing.

The summons and complaint was personally served on the president of the corporation in New York State November 30, 1908 (page 126). Personal "due and timely" service thereof was admitted by the defendant, through its president, and this rendered further service unnecessary (page 124).

32 Cyc 450.

Vermont Farm Machine Co. v Marble, 20 Fed. 117.
Allured v Voller, 107 Mich., 476.

Judge Black was the sole trustee of the corporation in Washington (page 99). Plaintiff's proof showed that he was the manager (page 95). Locke was employed to defend the case and carefully examined the merits and concluded there was no defense (page 95). He regularly appeared and recited his authority so to do (page 130) and entered into stipulations for hearings (pages 96;

130). He consented to the proceedings had before the judges and served formal appearance so he could look after necessary steps in the action (page 96). There was no fraud on the part of the plaintiff Bell in the employment of Locke, because he did not know of it until March 1909 (page 109) and Locke appeared months before (page 130).

“The defendant *** when he voluntarily entered his appearance *** placed himself in the same predicament with the other parties regularly before the court. *** The decree, therefore, so far as this exception is designed to affect it, cannot be impeached.”

Shields v Thomas et al, 59 U. S. (18 How.) 253, 259.

See Leach v Burr, 188 U. S. 510, 513.

The complaint does not question the appearance of Locke, as attorney for the corporation, and this being admitted the judgment cannot be collaterally attacked upon any ground, except by motion in the State Court and in the action there pending. This is true even where an attorney has no authority to appear or his appearance was procured by actual fund.

23 Cyc 1077.

Cen. Digest Vol. 30, sec. 930.

Landes v Brandt, 51 U. S. (10 How) 371 opinion.

Kent v L. S. S. C. R. & Co., 144 U. S. 75, 88.

Hilton v Jones, 159 U. S. 584, 589.

Graham v Spences, 14 Fed. 603.

Tarbell v Lee, 40 Fed. 40.

Fitzgerald Construction Co. v Fitzgerald, 137 U. S. 105, opinion.

In re Stillman 139 N. Y. 337, 341.

Washbon v Cope, 144 N. Y. 287, 294.

Mount City Co. v Castleman et al. 177 Fed. 510, 516.

Swift v McFarland, 215 Fed. 452, 456.

Gilchrist Co. v Erie S. Co. 215, Fed. 741, 743.

Bower v Stein, 177 Fed. 673, 677.

Nougue v Clapp, 101 U. S. 551, 554.

Graham v B. H. & E. R. R. Co., 118 U. S. 161, 177.

Marshall v Holmes, 141 U. S. 558, 600.

Hull v Burr, 234 U. S. 712, 718.

The rule is clearly stated by Justice Peckham in the Washburn case, 144 N. Y., at page 294, as follows:

“We think the objection grounded upon the unauthorized appearance of her attorney and the non-service of any process upon her cannot prevail in this action. It has been settled by an unbroken line of decisions in this state, running many years back, that, unless under some peculiar and extraordinary circumstances, not existing in this case, the objection that a party was not served and an appearance by an attorney in a court of record for such party was unauthorized, and, hence, that the judgment was without jurisdiction, cannot be taken in a collateral proceeding or action, and that the party is confined to a motion in the original action in order to obtain relief.”

This rule was early laid down as one governing practice in the Federal Courts where it was said in the Landes case, 51 U. S. ,page 371 (the parties claiming that the appearance of the attorney was unauthorized):

“If it was voidable for want of notice and a false statement on its face ‘that the parties appeared by their attorneys and dispensed with a jury and sub-

mitted the facts to the court', then it should have been set aside by an *audita querela* or on petition and motion; such being the familiar practice in similar case. Moreover; this suit in ejectment is collateral to the judgment; and it cannot be impeached collaterally."

The case of *Mound City*, 177 Fed. had under consideration facts very similar to those in the present case. There the complainant had full notice of a partition case in the State Court and the question of legality of advancements and in the State Court the advances were not litigated and in commenting thereon at page 516 the Court, said:

"Having failed to do so, that does not give the complainant any standing in an independent suit in equity to have such claim asserted. A judgment entered upon the merits is an absolute bar to a subsequent action. 'It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' If any matter competent in defense was 'not presented in the action the subsequent allegation of their existence is of no legal consequence.' "

The principle above announced has been carried through the decisions of the court down to the *Hull* case, 234 U. S. decided in June, 1914, where in commenting upon this practice at page 718 the court said:

"The District Court, in sustaining the demurrer, held that since upon the face of the bankruptcy proceedings there was no want of jurisdiction over the parties or the subject matter and the decree was not void in form, which could not be collater-

ally attacked and could be assailed only by a direct proceeding in a competent court.”

The cases cited by Judge Neterer (page 86) are conclusive upon the point. Attention is called to the Mitchell case 180 U. S., 471-480, which squarely holds that the determination in the State Court is binding upon the corporation and its privies so long as the judgment of the State Court remains unmodified.

In this connection it should be observed that there is no proof whatever in the case of want of authority in Locke to appear for the corporation in the action in the State Court and without such showing this court will presume that the State Court had jurisdiction of the parties and of the subject matter.

In re Cuddy, 131 U. S. 280.

In re Cooper, 143 U. S. 472, 506.

Hilton v Jones, 159 U. S. 584, 589.

In the Fitzgerald Construction case, 137 U. S. at page 105 Fuller, C. J., says:—

“That the appearance by the defendant *** waived all question of the service of process.”

The rule that complainant should have applied to the State Court for relief is especially applicable to this case. The laws of Washington make express provision for the application and require that it shall be made within one year after the order or judgment was made (page 112). This Circuit Court of Appeals has settled the rule adversely to the appellant.

Denton v Baker, 93 Fed. 96.

Strand v Griffith, 144 Fed. 828, 830.

II.

The action in the State Court was for a receiver, and the proceedings thereon were regular and cannot be attacked in the present suit.

Upon the trial complainant's counsel intimated that the action in the State Court was to foreclose a mortgage and a receiver therein was improper.

The plaintiff's bill is not upon this theory, and it does not charge that the state suit was a foreclosure action. The bill charges that the suit was filed alleging the insolvency of the corporation, that it owed over \$40,000, and had no money, that it had mining claims which would be forfeited unless the assessment work was done and that a receiver be appointed to protect the property (page 10). We now submit that the gravamen of the complaint in the State Court was the insolvency of the corporation, its lack of funds and credit and helplessness to hold its property and the necessity of a receiver to protect the same (pages 115 to 118). The prayer of the complaint asked for a receiver and that he be empowered to borrow money to do the assessment work and protect the property and the interest of the creditors and stockholders (page 118). True it did ask for judgment foreclosing the mortgage, but if a foreclosure was not proper in a receivership action it did not destroy the character of the action or render voidable the proceedings taken. Demanding the foreclosure in equity was simply asking too much and not the proper form of relief, and had no legal effect upon the facts stated.

Henningway v Poucher, 98 N. Y. 281.

Watkins v Watkins & T. L. Co., 11 App. Div. (N. Y.) 517.

The proceedings in the case show that no decree of foreclosure was asked or made (pages 123 to 149). That the notes in suit were presented to the receiver and not even given a priority under the mortgage (page 138). The plaintiff was entitled to any judgment consistent with the case made by the complaint.

Rogers et al v N. Y. & T. L. Co., 134 N. Y. 197, 219.

There is nothing in the record before this court showing lack of authority in the State Court and in the absence of such showing the authority of the State Court is presumed. Reference to the Washington Statutes show that the court has the right to appoint a receiver in foreclosure when necessary to protect the property involved.

III.

It is settled law in this country that a corporation can sell its stock at less than par.

As to plaintiff's claim that the corporation sold some of its unlawful issue of stock at 2 1-2 cents per share (page 6), the same does not seem to be now raised by the assignment of errors, but for fear it may be urged on other grounds we give it notice. The evidence shows this stock was sold at a time when the corporation had neither money or assets and it induced W. H. Baldwin to buy 200,000 shares at 2 1-2 cents a share or \$5,000.00. They got all out of Baldwin they could and more than they could from any one else. It was then worth less than 2 1-2 cents, in fact there was no market for it at any price (page 100).

Ever since the case of *Scoville v Thayer*, 105 U. S. 143, it has been held that a corporation can sell its stock at less than par. It is perfectly legal as between the corporation and its shareholders, but not as against creditors. *Camden v Stuart*, 144 U. S. 104, 113. And if sold at the best price obtainable it is proper even though prohibited by statute. *Grant v East & W. R. R. Co.*, 54 Fed. 575, opin., *R. R. Co. v Thompson*, 103 Ill. 187, See *Northern Trust Co. v Col. Straw Paper Co.*, 75 Fed. 936; *Kellerman v Maier etc.* 48 Pac. 377; *Old Dominion Copper Min. Co. v Lewisohn*, 210 U. S. 206.

There certainly can be no question but what if the issue of the stock was void Baldwin is entitled to a return of his \$5,000.00 and this the court cannot decree because the corporation has no funds and is insolvent and the plaintiff makes no offer to aid it.

IV.

The judgment obtained by Bell in Federal Court in New York was regular.

Upon the trial it appeared that defendant Bell procured a judgment against the Sunset Company in the District Court of the United States in the State of New York upon a note made by the corporation in said state. Service was made on the corporation in the State of New York.

The grounds of complainant's objections were that the Sunset Company had not complied with Section 15 of the Stock Corporation Law of the state which provides that a foreign corporation shall not do business in New York without filing a copy of its charter with the Secre-

tary of State and procuring a license authorizing it to do business in said state and further "no foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless prior to the making of such contract it shall have procured such certificate" (page 73).

It will be noted that the only penalty prescribed by the statutes is that a corporation cannot sue in New York State and the section has been construed many times by the courts of the State of New York and the holdings are squarely to the effect that the only effect of the omission to file copy of the charter and to obtain certificate authorizing the corporation to do business deprives it of the right to sue in the courts of the state and that a contract made by such corporation is perfectly valid within the state or elsewhere and can be enforced by the other party to the contract in the courts of said state and in the United States courts.

The V. Neuchatel Asphalte Co. v Mayor, etc., 155 N. Y. 373, 376.

Gaul v Kiel & Arthe Co., 199 N. Y. 472, 478.

Mahar v Harrington Park Villa Sites, 204 N. Y. 231.

Fritts v Palmer, 132 U. S. 282, 289.

David Lupton's Sons Co. v Auto Club of America, 225 U. S. 489, 495.

New York Breweries Co. v Johnson, 171 Fed. 582.

Richmond Cedar Works v Buckner, 181 N. Y. 424.

The cases are squarely upon the point and they are uniform in the holding. In fact, the New York courts

go so far as to hold (199 N. Y. 478) that where the corporation has failed to comply with the statute it cannot set up its failure in an action in the state court to defeat an action brought against it therein. This involves a well settled principle of law that a party cannot allege its own wrong as a defense to its own acts.

But the complainant urges that service on the corporation in New York State was not good because it was not doing business in that state. This is only one of the complainant's inconsistencies in this action. One of the grounds urged as wrong committed by the corporation is the fact that all of its books and records were kept in New York State and that its meetings were there held and its business there transacted (pages 5 and 6). The evidence shows that the directors of the company other than the defendant Black resided in New York and that the meetings of the company were held in that state and the minutes thereof sent on to Washington (pages 99, 100). To make any point of this matter at all the complainant is forced to repudiate the allegations of his bill and the proof he made on the trial but under the decisions of the court above cited there can be no point in the objection.

V.

This action was properly dismissed because the complainant's bill and proof did not excuse the requirements of equity Rule 94.

There is no averment in the bill nor proof in the case that before bringing this action plaintiff applied to the corporation, its trustees or shareholders to bring the same, nor is there any averment or proof offered excusing

such application. That such averment and proof must be made has long been our settled law. It was settled in the Federal Court in *Hawes v Oakland*, 104 U. S. 450, and as a result thereof made a rule of this court, while in the State Courts it has become firmly established by a long and unbroken line of decisions. The bill and proof must show that an earnest effort was made to the directors and share holders to induce the corporation to act, or show facts excusing the same.

- Hawes v Oakland*, 104 U. S. 450, 460, etc.
- Dimpfell v Ohio & M. R. Co.*, 110 U. S. 209, 211.
- Quincy v Steele*, 120 U. S. 241, 247, etc.
- Taylor v Holmes*, 127 U. S. 489.
- Porter v Sabin*, 149 U. S. 473, 478.
- Whitney v Fairbanks*, 54 Fed. 985.
- Putnam v Ruch*, 54 Fed. 216.
- Kessler v Ensley Co.*, 123 Fed. 546.
- Macon R. Co. v Shailer*, 141 Fed. 585, 591.
- Thomasson v Trust Co.*, 159 Fed. 126.
- Poor et al v I. C. Ry. Co.*, 155 Fed. 230.
- Clarke v Eastern B. & L. Assn.* 89 Fed. 779, 781.
- Graves v Gouge*, 69 N. Y. 156.
- Flynn v Brooklyn R. R. Co.*, 158 N. Y. 493, 508.
- Kavanaugh v Trust Co.*, 181 N. Y. 121.
- O'Connor v V. P. & P. Co.*, 184 N. Y. 52.

There are cases which hold that where the corporation refuses to act, the stockholder can by showing the corporation so disorganized that it cannot act; or that a majority of the directors have personal interests adverse to that of the corporation; or that the suit is to disapprove breach of trust on the part of the directors, and such are the cases cited by the appellant. These cases do

not hold that averments to the above effect are not to be made and proven, but on the contrary all the cases do hold that the facts must be particularly set out.

The averment and proof that application has been made and refused or that it would be unavailing are essential parts of the cause of action, and of course every cause of action must be proved.

Greaves v Gonge, 69 N. Y. 154, 157.

Flynn v Brooklyn R. R. Co., 158 N. Y. 493, 508.

O'Connor v V. P. & P. Co., 184 N. Y. 52, 53.

There were five trustees of the corporation (page 8). The bill charges that Black, a trustee and manager of the corporation, with Bell, Baldwin and McNutt, wrongfully issued the notes without consideration. There is no intimation that any of the persons named were trustees, other than Black, and that Baldwin afterwards became a trustee (page 7). That Black and Bell held the majority of the stock of the corporation and intimated, that as such holders they controlled it (page 16). These are the only allegations bearing thereon. The bill shows that Black, McNutt, Davis, Sellingham and Metzger were the last trustees named, and there is not even a suggestion in the bill that Black or Bell knew, controlled or dominated any of them, or that they were connected with or interested in the acts charged against Black and Bell. The charge of the bill is that Black and Bell were the sole actors and persons in interest and the purchasers at the sale (pages 9, 16).

Weak as is the bill the proof falls far short of it. The notes were all issued before the year 1905 (pages 7, 8). Bell never was a trustee but for a single day in 1904

(page 76) and this was to work out a change in trustees (page 109). Bell did act as counsel for the corporation for a time but severed his relations with it in April 1906 (page 109) and from that time on was ^{not} ~~not~~ ^{its counsel} and there is no proof to show that he had any connection with the company. He did not become owner of the notes until August, 1907 (page 108), or three years after they were made. There is no evidence to show that at the time the notes were made he knew about them ~~nor~~ that he had any interest or relations with the corporation or persons interested in it. The proof fails absolutely to connect Bell with any charges made in the bill.

The court in disposing of the case clearly sums this up and says:

“Nor is there any evidence before the court to justify the conclusion that either the defendant Black or Bell has had any influence over the board of trustees or exercised any undue influence of any character in any of the proceedings referred to in the complaint.” (Page 78).

In an examination of all of the authorities bearing upon the point under consideration we have been unable to find a single case holding that the facts here presented excuses demand on the corporation to bring the action, but on the contrary they do hold upon these facts that the demand must be made and the particulars alleged and proved.

In disposing of this point it must be kept in mind that Black is the only director charged with wrong and it is not charged by the bill or proof that either Black or Bell had any relations or influence or control over the other directors.

The case of *Watson v U. S. Sugar Refinery*, 68 Fed. 769 is directly in point in this case. There are four trustees, one of whom was charged with fraud, but the other three were not and the court dismissed the bill for failure to comply with Equity Rule 94, and at page 772 said:

“The rule is well settled that a stockholder cannot maintain a suit for a wrong to the corporate body without showing either an effort to set the corporation in motion to redress the wrong, an application made to the Board of Directors to that end or that such efforts or applications would be useless, and this requirement is not satisfied by an allegation that the directors or a majority of them are acting in the interest or under the control of others who are charged with the fraud.”

Other cases bearing directly on the proposition that the allegations must be made in addition to those above cited are:

Detroit v Dean, 106 U. S. 537, 541.
Vener v Gr. N. Ry., 209 U. S. 24.
Foote v Cunard Min. Co., 17 Fed. 46.
Edward v Trust Co., 124 Fed. 381.
Securities Co. v Transit Co., 165 Fed. 945.
Price v Land Co., 187 Fed. 886.

As was said in the *Venner* case, 209 U. S. at page 34:

“The rule was adopted and the allegations made essential to the exercise by the court of its equity jurisdiction. It would seem that the rule needed no discussion under the circumstances because it requires explicitly that the bill set forth with particularly the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees and, if necessary, of the shareholders, and the causes of his failure to obtain such relief.”

VI.

The action was properly dismissed because the corporation was not made a party defendant.

The transcript shows that the corporation did not appear in the action and there was no proof of service upon it. In fact, no claim was made by the plaintiff that the corporation was ever served.

If there is a cause of action alleged in the complaint it belongs to the corporation itself. In other words, if the corporation could not maintain the action the same could not be maintained by a stockholder. This being **the principle involved** the courts have held uniformly that the corporation was a necessary party to the end that it should be bound by the judgment. We have been unable to find any case which departs from this rule and all the cases hold strictly to it.

Greaves v Gouge, 69 N. Y. 154, 156.

Flynn v Brooklyn City R. R. Co., 158 N. Y. 493, 508.

Porter v Sabin, 149 U. S. 473, 478.

Putnam v Ruch, 54 Fed. 216.

That the cause of action belongs to the corporation is also equally well settled.

Flynn v Brooklyn R. R. Co., 158 N. Y. 508.

O'Connor v Virginia P. & P. Co., 184 N. Y. 46, 53.

Porter v Sabin, 149 U. S. 473, 478.

Whitney v Fairbanks, 54 Fed. 985.

Clark v Eastern B. & L. Assn., 89 Fed. 779, 781.

The principle has recently been announced by the United States Supreme Court which holds that the suit is that of the corporation itself. *Deckerman v Northern Trust Co.*, 176 U. S. 181, 188.

VII.

The action was properly dismissed because brought by the plaintiff individually.

The rule is equally well settled that where the corporation refuses to bring the action for alleged fraudulent acts or wrongdoing of the directors a stockholder can sue only "in behalf of himself and all other stockholders similarly situated". It is usual to put this provision in the title but some cases have held that where there is an allegation to the effect that it is brought in behalf of plaintiff and other similarly situated, etc., this is sufficient but that it must be so brought is clearly held.

Kavanaugh v Trust Co., 181 N. Y. 121, 124.

Dodge v Woolsey, 59 U. S. 331.

Smith v Poor, 22 Fed. cases No. 13093.

Carson v Glasgow, 189 Fed. 791.

Davis v Peabody, 170 Mass. 397, 400.

After citing the cases bearing thereon Chief Justice Cullen in the *Cavanaugh* case, 181 N. Y., 124 says:

" 'The right of action, however, belongs to the corporation and should be brought by it as plaintiff, but when it will not bring the suit itself, an aggrieved stockholder, after due demand and refusal or unreasonable neglect to proceed, may bring it in his own name on making the corporation a party defendant'. The action must be brought not only on behalf of the plaintiff, but

also on behalf of all other stockholders of the company, and that is the form of the action before us."

In the Davis case, 170 Mass. at page 400 that court says:

"All the shareholders have an interest in that branch of the bill which alleges maladministration of the trust property. *** To obtain such relief the plaintiff must either sue for the benefit of all having like interest to himself so that they may come in and share in the conduct of the suit, or make them defendants". (Citing *Snow v Wheeler*, 113 Mass., 179; *Tyrrell v Washburn*, 6 Allen, 466.)

Where the suit is brought by a single stockholder and other stockholders do not intervene this court will assume that the other stockholders are satisfied on the matters complained of. *Carson v Allaging W. G. Co.*, 189 Fed. 791.

VIII.

Plaintiff failed in this case to show that he was injured by the sale and this was cause for dismissing the action.

The bill alleges that Black and Bell paid \$40,000 for the mining claims, but they were worth much more (page 16). This is denied by Black's answer (page 35) and by Bell's (page 57). There is no evidence in the record to show that the property was worth a single dollar. Plaintiff's own proof shows that the state court had adjudged the corporation insolvent (page 132). The claims proved before the receiver amounting to over \$64,000.00 (page 145). Upon the trial plaintiff showed that as early as 1903 the corporation was without money or

assets (page 100). He also showed that the corporation received money for the face of the notes and that to August 1904 there was spent in development work and machinery \$30,000 for which the notes were given (page 2). In disposing of the case the court said there was no evidence before it of the value of the property as mineral land (page 79).

Upon this showing it is clear that the allegations of the complaint to the effect that the notes were given without consideration were untrue and as the evidence stands all of the debts and claims presented to the receiver in the State Court action were valid claims and if the sale should be set aside or the plaintiff had appeared in the action and resisted the proceedings it would not have benefited him because the company was insolvent and unable to pay its debts and there was consequently nothing for the stockholders. These facts bring this plaintiff's case clearly within the principles laid down in *Darragh v H. Wetter Mfg. Co.*, 78 Fed. 7, 16.

Hill v Phelps, et al. 101 Fed. 650, 653.

A. T. & S. F. Ry. v Sullivan, 173 Fed. 456, 476.

Peoples U. S. Bank v Gibson, 161 Fed. 286, 292.

The *Darragh* case is so clearly in point on the principle that we quote the following:

“Does the bill of the appellant state facts sufficient to entitle him to a vacation of the decree for the sale of the property of the Dickinson Hardware Company, for the discharge of the receiver, and for the ultimate return of its property to the corporation? *** He is a stockholder. Conceding that the acts of the president and directors of the corporation were intended to and did wreck the

business of the company. *** It is not alleged that he incurred any personal liability by his ownership of his stock. Was his stock in any way depreciated in value by the acts of the appellees? *** There is no allegation in this bill that the stock of the appellant was of any value when the order appointing the receiver was made and *** we have been forced to the conclusion that it could not have been. *** For this reason we think this bill cannot be maintained. The appellant who seeks relief here shows his stock was worthless when the acts complained of were committed, so that he could not have been injured by them. He shows that no relief that the court below could have given could possibly have made it of any value. Courts of equity cannot attempt to right wrongs at the suit of those who have not suffered from them, or grant decrees that can give their suitors no relief."

The courts say of this that equity will not right wrongs at the suit of those who have not suffered by them. Resulting legal injury is as essential to equity as casual wrong (173 Fed. 467; 161 Fed. 294).

Foster v Mansfield C. & L. M. R. Co. 146 U. S., 88 was an action brought to vacate a decree in foreclosure and the plaintiff failed to show that the property involved was worth more than what it sold for on the former sale or that on a re-sale there would be anything to come therefrom to the plaintiff who was an unsecured creditor, the facts being somewhat similar to those under consideration, and the court said, page 101:

"A court of equity is not called upon to do a vain thing. It will not entertain a bill simply to vindicate an abstract principle of justice to compel the defendants to buy their peace, and if it appears that the parties really in interest are content that the decree shall stand, it should not be

set aside at the suit of one who could not possibly obtain a benefit from such action.”

In other words, equity will not do a vain thing.

IX.

Plaintiff failed in establishing any charges of collusion or fraud.

The plaintiff's bill is founded on these charges against Black and Bell. In disposing of the case the Court said there was no such evidence (page 78). Black threatened to defend any suit Bell brought to enforce the notes and said he would make it expensive for Bell (page 102). Bell knew nothing about the proceedings in the State Court and relied upon his attorney (page 109). Black and Bell never agreed on anything until the day of the sale when they finally came together and agreed that they would bid \$40,000 for the property and if anyone bid more they would let it go (page 1103. This did not show any collusion or fraud or desire on their part to get hold of the property. The only thing that can be spelled out of this was a purpose on Bell's part to protect his debt.

Collusion is an agreement between two or more persons to defraud a person of his rights by the forms of law, or, to obtain an object forbidden by law. *Dickerman v Northern Trust Co.* 176 U. S. 190; *Wallace v Jones*, 122 N. Y. App. Div. 497. It is a concert of action based on some agreement.

This case is free of anything of this kind and the evidence does not even furnish an excuse for a discussion

of the question. There was no wrong in Bell enforcing his claim as we shall see by the next point.

X.

Bell's motives in enforcing his claims are immaterial and will not be inquired into by any court.

Upon the trial plaintiff disproved the charges of his bill that the Baldwin notes, in suit in the State Court, were given without consideration. He showed that the company received the full face of the notes and that the same was spent for corporate purposes (page 102). The action was not commenced until 1908 (page 122) and the notes were all due in the year 1904 (pages 123, 124).

Wrongful motives or collusion in the enforcement of any claim is not a defense, and payment of the debt can only arrest the action.

Morris v Tuthill, 72 N. Y. 575.

Swift v Finnigan, 53 N. Y. App. Div. 74.

Weis v Levy, 106 N. Y. App. Div. 500.

North C. R. Co. v Blackman, 145 N. Y. App. Div. 199.

Dickerman v Northern Trust Co., 176 U. S. 181, 190.

The Morris case is the leading one on this proposition, and has been followed and adopted as the law of all the states and of the United States.

In the Dickerman case (176 U. S.) in speaking of the principle the court, at page 190 says:—

“If the law concerned itself with the motives of parties new complications would be introduced into suits which might seriously obscure their real merits. If a debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motives.”

Courts will never stop to inquire into the motives actuating a person in the enforcement of a legal right.

Clinton v Myers, 46 N. Y. 511, 521.

Phelps v Nowlen, 72 N. Y. 93, 45.

Lough v Outerbridge 143, N. Y. 282 opinion.

Cainfield v U. S. 167 U. S. 523 opinion.

XI.

The judgment and sale in the state court is res adjudicata, and cannot be questioned collaterally by a party or privy.

The United States Supreme Court has definitely settled this principle, and in the following language:—

“The general principle announced in numerous cases is that a right, question of fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right question of fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determina-

tion. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property, if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue and actually determined by them."

Southern Pacific R. R. Co. v U. S., 168, 1, 48, 49.
Mitchell v First Nat. Bank, 180 U. S., 471, 480.

The same rule applies in equity actions, and the remedy is by appeal or motion in the original action.

Bryan v Kennett, 113 U. S. 179, 197.
United States v Throckmorton, 98 U. S. 61.

This is true even though the trial court erred in the facts or law, and applies to an order of sale.

Hine v Morse, 218 U. S. 493, 505 to 509.
Fauntleroy v Lum, 210 U. S., 230, 237.

The cases hold that even though the judgment is against the facts, or without facts to sustain it, the rule still holds good. Other cases to the same effect are:

Gunn v Plant, 94 U. S. 664, 669.
Millen v Maline Iron Works, 131 U. S. 352, 367.
Kent v L. S. L. Co., 144 U. S. 75, 88.
Insley v United States, 150 U. S. 512, 515.
Reinach v A. G. W. R. Co., 58 Fed. 33.
Mound City Co. v Castleton, 177 Fed. 510.
Stokes v Foote, 172 N. Y. 334.
Re Jenkins, 132 N. Y. App. Div. 339, 343.
Blake v J. V. L. & F. M. Co., 77 N. Y. 626.

Reed v Weed, 107 N. Y. 445.

Thomson v Wooster, 114 U. S. 111 opin.

The same rule applies to a receiver's sale.

McEwan v Harriman Land Co., 138 Fed. 797.

If the defense might have been considered, if they were such as might have been given by a court of law, they were determined by the judgment regardless of whether or not they were interposed by the defendants or considered by the court.

Intermela v Perkins, 213 Fed. 106, 108.

Re Jenkins, 132 N. Y. App. Div. 339.

Stokes v Foote, 172 N. Y. 327, 344.

A stockholders of a corporation against which a judgment has been taken is a privy in law and cannot attack the judgment collaterally.

Graham v Boston H. & E. R. Co., 14 Fed. 753, 760.

National F. & P. Works v Oneonta W. Co., 68 Fed. 1006-7.

Affirmed, 183 U. S. 216.

Sanger v Upton, 91 U. S. 56, 59.

Nougue v Clapp, 101 U. S. 551.

Graham v Boston H. & F. R. R. Co., 118 U. S. 161, 177.

Hawkins v Green, 131 U. S., 319, 329.

Green v Leggett, 135 U. S. 533, 544.

Mason v Peck, 103 Me. 430.

Ross v Dewey, 215 Pa. 526.

Black on Judgments, 2nd Ed. Sec. 549.

The language of the courts is too clear to admit of doubt:—

“The stockholder is bound by a decree of a court of equity against the corporation, *** although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that, in view of the law, he is privy to the proceedings touching the body of which he is a member.” (135 U. S. 544).

It is difficult to discuss the appellant's contention on this point because there is nothing in the record to take this case out of the principles laid down by the cases. We cannot point to any collusion or fraud, because none was shown. The notes in the state suit were just debts of the corporation because it had the money on them (page 102). The notes were all due in the year 1910 (page 7) and Bell was obliged to enforce the collection of them or they would outlaw. Bell was not a trustee, and severed his connection as attorney for the company in 1906 (page 109). As before pointed out Bell cannot be charged with wrong in seeking to enforce his just legal claims, although Black did try to resist the enforcement of them (pages 102, 108). The corporation regularly appeared in the State Court (page 130) and thereafter the court made a judgment adjudging the corporation insolvent and directed its property to be sold to pay its debts (page 132), on the appearance of Locke, the company's attorney (page 96). The claims against the company were properly proven and amounted to over \$64,000.00, and that the receiver had in addition borrowed \$3,200.00 (page 145). Under an order of the court the sale was made March 20, 1909 (page 155).

Rudebeck, a minority stockholder, objected to the confirmation of the sale (page 158) as did one Reid (page 159) alleging mismanagement and fraud (page 160) and that Black and Bell were trustees and had assisted in putting the corporation in its then condition (page 162). In fact the objections raised all the questions set up in the bill in this action. Locke, attorney for the corporation, and Root and Duryee, attorneys for the objectors, were heard by the Court, but the sale was confirmed (page 165). Buchler knew all about the objections made by Rudebeck and Reid and had correspondence with them bearing thereon (page 105). Holmes, an attorney at Everett, wrote Buchler all about the suit, and he was in correspondence with Duryee about the objections (page 105). March 27, 1909, Buchler concluded to abandon relief in the State Court and take the matter to the Federal Court (page 105). He is now in no position to urge ignorance of what took place and if the cases bearing thereon are controlling he misconceived his remedy.

Buchler is not only concluded by the judgment against the corporation, but also by the objections of the stockholders. Where one stockholder brings a proceeding in Court for himself and others the decision thereon is binding on all other stockholders.

Willoughby v Chicago etc., 25 Atl. 277.

Hearst v Putnam, 77 Pac. 753.

The opinion of Judge Neterer correctly and ably disposed of this question (page 85, etc.)

XII.

A trustee may, at a public sale, bid in the corporate property.

This question cannot affect the purchase of Bell because he was not a trustee, neither was he its counsel for this relation he severed in 1906 (page 109), and he did not become owner of the notes until 1907 (page 108).

Under the circumstances it does not apply to Black. He did not procure the action to be begun on the notes and even made the trip from Everett, Washington, to New York City to induce Bell to withhold enforcing the notes, and threatened Bell that if action was commenced he, Black, would fight it to the end, but said if Bell gave the company a reasonable time in which to raise money he, Black, would not make Bell unreasonable expense (page 102). There certainly was no fraud or wrong in this, much less any collusion. Black failed in his efforts and the plaintiff refused to contribute (page 109). Black had been advancing money to the corporation, it owed him \$10,000, part in judgment, part secured by a mortgage and part for salary and the assets of the company did not equal its debts (page 101), and there is nothing in the record here to show that the assets were worth a single dollar. Buchler was asked to put up his share of money, on basis of his stock holding, and he said he would not put up a dollar (page 109).

Under these circumstances Black was legally entitled to bid, and for his personal protection it was his duty so to do.

“The principle that a trustee may purchase the trust property at a judicial sale brought about by

a third party *** is upheld by numerous decisions of this court and of other courts of this country."

Allen v Gillette, 127 U. S. 596 opinion.

The leading case upon this question in this country is that of Twin-Lick Oil Co. v Marburg, 91 U. S. 587. There the property was oil wells of doubtful value, here mining claims not shown of any value. In that case the trustee had loaned it money and bid in the property at a judicial sale. The facts in each case are practically the same even to asking the complaining stockholder to contribute, and the court held the sale valid.

Another case involving about the same facts as we have here is Marks v Merrill Paper Mfg. Co., 188 Fed. 850, and the right of the trustee to buy was upheld.

Being a creditor Black had the undoubted right to buy.

Kent v L. S. C. Co., 144 U. S. 88 opinion.

Upon such facts as we have in this case the courts have always held that a trustee could buy.

Hapending v Munson, 91 N. Y. 650.

Duncomb v N. Y. N. H. & H. R. H. R. 84 N. Y. 190-208.

Leavenworth County v C. R. I. & P. R. R. Co., 134 U. S. 688, 707, 9.

Ryan v Williams, 106 Fed. 172.

Burnes v Burnes, 137 Fed. 781.

Wheeler v Abilene etc., 159 Fed. 391.

Cowell v McMillen, 177 Fed. 25.

Marks v Merrill Paper Mfg. Co., 203 Fed. 16, 19, 20.

Saltmarsh v Spaulding, 17 N. E. 316.

Jenney v Minnesota, 82 N. W. 984.

New Memphis Gas Light cases, 60 S. W. 206.

The contention of the plaintiff is that a purchase by a trustee is void, and herein is where he errs. It is not void; but if the trustee secretly or fraudulently deals with the corporate property or profits in his transactions with it or acts as both seller and buyer and in either case promotes or consummates the acts he may be called upon to show the fairness and good faith of his dealings and if in these he fails the transactions are voidable at the election of the corporation. The present case does not fall within the rule because Black did not invite the action in the State Court, but resisted it to the best of his ability. He did not do the selling, and at the time of the sale he had no relations with the corporate property. The corporation and its property was in the hands of the court and the trustees could not act and the sale was made by the court through its officer, the receiver, a distinction clearly pointed out in Twin-Lick Oil Co., 91 U. S. 590 opinion.

It was proper for Black to loan money to the corporation and take security, and to hold or buy the property on his debt and this took him out of the rule (Duncomb case, 84 N. Y. 199 op.) It is now firmly established that a trustee may loan money to the corporation and is a settled and universal practice. It is the history of every corporation that it comes to financial want and certainly none are more interested in it, and its success, than its trustees. If the trustees could not aid ~~it~~^{them} with funds in time of need most of our corporations would not now exist. If the trustees could not thus loan money it would

be a great hardship on the creditors, trustees and shareholders. This is illustrated in the present case: There were no bidders but Black and Bell and but for them the property would have gone for a nominal amount. There would have been a deficiency of \$50,000 or \$60,000 in which event this complainant instead of bringing this action would be defending a suit requiring him to pay up the amount unpaid on his 58,000 shares of stock.

The cases are very clear upon this question and we ask only a consideration of them. In disposing of the question we ask this court to consider with it our next point.

XIII.

The action was properly dismissed for laches and want of equity.

In this case these two questions are so closely related that time will be saved by discussing them together, and they require a brief review of the facts and the conduct of Buchler as disclosed by the record. They are as follows:—

The Sunset Company was originally organized with a capital stock of 2,000,000 shares of \$1.00 each and this was all issued before the year 1903. With this stock all outstanding the company in the year 1903 had neither money^{or} assets (page 100). Buchler became the owner of his 58,000 shares previous to April 1st, 1899 (page 103). There is nothing in the record to show that the company, up to this time, ever did any work or expended any money on mining claims or that it even held or claimed any such claims, and the conclusion is irresistible that the original issue of stock was given away or at least practically so. No charge

of mismanagement is made up to the year 1903, and if money was paid for the stock what became of it, when the company had nothing to show for it? About this time the company's trustees came in contact with W. H. Baldwin, and they having neither funds^{or} property induced Baldwin to take 200,000 shares of stock of an increased issue *at* 2 1-2 cents per share and he paid to the company \$5,000 therefor. They made the hardest possible bargain with Baldwin, getting out of him all they could, and the stock was not worth anything (page 100). The increased stock was not subscribed but was issued for a group of mining claims, and the stock turned back as treasury stock (pages 100, 101). Baldwin had nothing to do with this increased stock, except to buy it. It was not shown that he was even a stockholder or trustee and he never took any more of this increased stock. In November 1903 the company began to do something, and up to September 1904, borrowed of Ellen C. Baldwin about \$30,000 (pages 7, 8, 102). This money was used in putting in machinery and developing the property (page 102). This it seems exhausted the Baldwins for after 1904 nothing was done but the assessment work of \$3,600.00 annually (page 102). With the exception of one year this \$3,600 was furnished by Mrs. Baldwin up to 1908, and the last money she loaned the company she secured by a mortgage on her little home (not in the record, but was in evidence).

W. H. Baldwin died prior to 1908 (pages 8, 9), the fact being he died in 1905 or 1906. Ellen C. Baldwin then became the owner of 1,250,000 shares of stock and her notes (pages 9) and these with the mortgage were assigned to Bell in 1907 (page 102).

From March 1899 to 1907, nothing is heard of Buchler in these matters. In the latter year he employed an attorney to set aside the increase of stock made in the year 1903, and the record is silent as to whether an action

was commenced and, if so, the results thereof (page 104). In 1908 he went to Everett, Washington, and took from Black an unexpired option on the Baldwin stock, notes and mortgage (page 104), but did not purchase under the option. It is evident that he did not begin an action, but concluded that it was more to his interest to take an option on the stock he says was void and the notes and mortgages he alleges were given without consideration, and with the intent and for the purpose of selling all at an advance and to the end that he might profit therefrom. His willingness to participate in anything is evident when he felt he could turn it to his personal advantage.

Buchler did not meet with success in selling his option so he went back to Black and labored with him to induce Bell to foreclose the mortgage, bid in the property and then let him, Buchler, sell it (page 106). Black refused and in the summer of 1908 Buchler came on to New York and saw Bell; he asked Bell to foreclose the mortgage and let him handle the property after the foreclosure, saying that he could sell it as a whole, but could not sell a controlling interest. Bell declined and asked him to put up his part of necessary money to do the assessment work and protect the property, and he said he would not put up a dollar and that the other stockholders would not put up anything. Bell then told him that unless the other stockholders did their part he, Bell, would enforce his claims and would not assume the duty of others (page 109). Buchler was in court and heard this testimony and did not even attempt to deny it, and it stands admitted.

It is clear that Buchler's trip to Washington and his visit to New York was prompted solely by his desire to make money. He did not care for the corporation or its

stockholders but was ready and anxious to enter into any plan that would enure to his advantage. His motive was to get something for nothing and he had no scruples about the methods pursued if the end which he sought was accomplished. It would be hard to conceive of more unscrupulous and dishonest motives than those, disclosed by this record, which actuated Buchler in his conduct.

On November 16, 1908, Bell sent a circular letter to all the stockholders (pages 108, 109) giving the condition of the company. He sent a lot of these letters to Buchler and asked him to send them to stockholders in Philadelphia (page 109). He advised the stockholders it was necessary to do the assessment work and patent the claims and for these purposes the company must have \$13,600 and if the stockholders would advance their part, based on their holdings of stock, Bell and Black would do their part and let their claims rest and join the other stockholders in trying to do something with the property. He also advised them that if they did not do their part it meant a receivership and sale of the property (pages 152 to 154). Buchler received these letters and had other letters about them (page 105) but refused to put up a cent. Bell received only about \$60.00 from other stockholders and this he returned (page 109). From this it is clear that in the year 1908, Buchler and the other stockholders had lost interest in the property and not only did not care to but declined to contribute to its protection.

Next Bell began action in the Superior Court of Washington for a receiver and the enforcement of his claims and the corporation regularly appeared in the action by an attorney (page 130). Buchler knew of the notes and mortgage in 1907; he knew of the action in the State Court before the sale and also knew about the judg-

ment Bell secured in New York; and before the sale he knew the property was to be sold to pay its debts (page 104). From February 1908 until after the sale he was in constant correspondence with Holmes (page 105) who was his partner in taking the option from Black (page 104). He was in correspondence with Rudebeck, a minority stockholder, who was trying to stop the sale and with Duryee, an attorney for minority stockholders, who were objecting to the confirmation of the sale, and March 27, 1908, he wired Duryee that he was in favor of taking the matter to the Federal Court. In 1908 he looked into all the company's affairs and even got a copy of the mortgage (page 105).

The corporate property was sold by the receiver to Black and Bell March 20, 1909, for \$40,000, and after the sale Black and Bell held a meeting with the other stockholders and offered to let them come in and share in the bid on the basis of \$40,000, Bell offering to throw out his judgment recovered in New York and to lose his services. Bell offered to do this upon the trial (page 110) and Buchler would not even accept this offer. The notes with interest at the time of the sale amounted to \$37,500 (page 138) and the receivers certificate, held by Black and Bell, \$3,200 (page 145) or more than the bid. The total debts and receivers certificates amounted to \$67,201.97 (page 145) so that the offer of Black and Bell to the stockholders was the wiping out of indebtedness of over \$27,000.00. Was there here any evidence of a desire on the part of Black and Bell to convert the assets of the company to their own use? The statement of the facts is the best answer. Bell and Black had their money or their time and services in the greater part of this \$27,000 and we submit that their conduct not only shows an ab-

sence of any wrong, but on the contrary, evidence of the fairest and most equitable and liberal treatment and consideration of all. These offers make it clear that Buchler is not here acting in good faith, because the offer was and is without limit and he could have taken all or any part of it, and for the \$40,000 wiped out about 2,500,000 shares of stock and over \$67,000 in debts and owned all the property. It is over evident that Buchler wants no share in the property and while here professing good faith his one object is, if possible, to force Black and Bell to "buy their peace."

At the time of the sale Buchler knew that no application for patents had been made. He knew that it required an annual expenditure of \$3,600 to hold the claims, and had been advised that it would cost \$10,000 to secure the patents (page 152). He knew that Black and Bell were doing the assessment work and had applied for patents for his bill alleges the latter (page 16). He made no offer of assistance in these matters and knowing what Black and Bell were doing and, without objection, let Bell put up \$12,145.00 (page 110) and Black put up a like amount (pages 102, 103). In fact from the year 1907 down to the time of the trial Black and Bell put up the money for annual assessment work and caring for the property and surveying and patenting the claims (page 102). They thus put up about \$25,000 (page 79) and with interest this now amounts to over \$30,000. To this day the patents have not been granted but the government has rejected a portion of them (page 111).

Buchler even now does not offer to pay any part of these expenses nor any part of the company's just debts. His conduct and delay in acting is easily accounted for.

He declined to give the company aid when it was asked, and said he would not contribute a dollar. He was advised of every act as it took place, yet he stood quietly by and did not murmur a protest, and what was his motive? In 1908 he procured a copy of the mortgage (page 105) and knew of the notes, even taking an option upon them (page 104). He set up the notes in his bill and knew that they outlawed in 1910, and that if he could wait and begin an action in 1912 and vacate the judgment in the State Court he would beat Bell out of over \$37,000, the principal of which the company received and had expended on its property. He knew the corporate property was of doubtful value, and even upon the trial in this action did not attempt to show that it had any value, and failing in this it is fair to assume that it had no value. His bill alleged that it was worth over \$40,000 (page 16), but this was denied by the answer of Black (page 35) and Bell (page 57) and the question of value was in issue. The Court says there was no evidence of the value of the property as mineral land (page 79). He further knew that there was no certainty of obtaining patents from the government and if Black and Bell failed on their applications they would lose their money and this may turn out to be the case. It is therefore apparent that the whole purpose of Buchler's delay was to let Black and Bell take all of the chances, and if they lost he would not suffer. It was not, and is not now, his purpose to risk a single dollar but that Black and Bell shall stand all risk and if their venture fails it shall be their loss, but if it turns out well that they shall be deprived of it absolutely and that he shall reap the full benefit of their efforts and expenditures. Where is the honesty of purpose in this and where is the complainant's fairness and equity? We submit that he has none of either. Not only this but his

selfish and mercenary purpose is shown by bringing this action individually in an endeavor to reap the whole benefit, leaving out the corporation and other stockholders, and not even pretending to sue "for himself and other stockholders similarly situated."

The complainant now urges that the trial court erred in holding the receiver's sale valid (Assn. IX, page 193). The sale by the receiver was March 20, 1909 (page 155), and this action was begun March 27, 1912 (page 21) or over three years after the sale.

This action is for fraud and under the laws of the State of Washington outlaws in three years. Plaintiff makes no claim that he was ignorant of the acts complained of so the statute began to run from date the sale was made. The superior court of that state can vacate a judgment obtained by fraud practiced by the successful party, but the application therefor must be made within one year after the judgment or order was made and upon petition or by affidavits (see pages 111, 112). The judgment in the State Court was made and entered January 30, 1909, (page 133) and the order of sale February 15, 1909 (page 147) so that complainant's remedy had been outlawed for over two years when the present action was commenced.

The Federal Court has settled that,

"In case of a constructive trust, lapse of time is as complete a bar in suits of equity as in actions of law, and in determining bar from lapse of time courts apply the statutes of limitation. This does not apply to express trusts."

Merrill v Town of Monticello, 66 Fed. 165.

Missouri S. & L. Co. v Rice, 84 Fed. 131.

Cooper v Hill, 94 Fed. 582.

In Washington an action based on fraud outlaws in two years,

Wagner v Law, 3 Wash. 88
and actions against stockholders in two years.

Aldrich v Skinner, 98 Fed. 375
Aldrich v McClam, 98 Fed. 378.

“Whatever may once have been the rule, it is now well settled that the statute of limitations run in favor of a defendant charged as trustee of an implied trust.”

Hecht v Staney, 14 Pac. 88.

Equity requires diligence on the part of a complaining stockholder, and when he remains inactive and permits others to expend money in improving property equity will not aid him.

Roberts v Northern Pacific R. R., 158 U. S. 1, 11.
Penn. Mutual L. Ins. Co. v Austin, 168 U. S.
685, 698.

This rule has in particular been applied to mining properties. In speaking of this class of property, Justice Miller in *Twin-Lick Oil Company* case (91 U. S., 592) says:—

“Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious, of permitting one holding the right to assert an ownership in such property to voluntarily wait the event, and then de-

cide, when the danger which is over has been at the risk of another, to come in and share the profit."

In another mining case, *Johnson v Standard Mining Co.*, 148 U. S. 360, at page 371 Justice Brown says:—

"Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development."

Where the stockholder awaits the outcome of the venture the rule is not changed because the trustee is a purchaser.

Haywood v National Bank, 96 U. S. 611.

Hoyt v Latham, 143 U. S. 553, 567.

Felix v Patrick, 145 U. S. 317.

Hammond v Hopkins, 143 U. S. 224, 334.

And under these circumstances a sale will not be set aside at the suit of a single stockholder.

Foster v M. C. & R. R. 146 U. S. 88, 99.

Where the complaining party is ignorant of the facts or they have been suppressed from him by the alleged wrongdoer or the facts are such as not to put him on inquiry, then the court, in furtherance of justice, will not apply the running of limitation statutes until such time as he had notice or by the exercise of reasonable diligence he should have had constructive notice. We concede this rule without the citation of cases but this complainant does not fall within the rule because he alleges no ignor-

ance and upon the trial testified that he knew of every act and all the facts as they occurred.

On the other hand where the complaining party knew the facts the courts uniformly deny relief in a shorter time than that prescribed by the limitation statutes.

Whitney v Fox, 166 U. S. 637.

Equity does "not sit to restore opportunities or renew possibilities which have been permitted to pass by the neglect, the ignorance, or even the want of means of those to whom they were once presented."

Leavenworth County v C. R. I. & P. R. R., 134 U. S. 709 opinion.

This Circuit has disposed of the question under consideration, Denton v Baker, 93 Fed. 96, Judge Ross saying:—

"But such relief is never given upon any ground of which the complainant, with proper care and diligence, could have availed himself in the proceeding at law. *** If he be not within this category, the power invoked will refuse to interfere, and will leave the parties where it finds them. Laches, as well as positive fraud, is a bar to such relief."

In the above case complainant alleged the procuring of a fraudulent judgment against a bank in Washington. He did not apply to the State Court and after two years sued in the Federal Court. The action was dismissed for laches.

Again Strand v Griffith, 144 Fed. 828, 830 (in this Circuit) Judge Gilbert, says:—

“The bill presents the question whether a Circuit Court *** can revise or set aside a final decree rendered by a State Court *** upon the ground of fraud, when the injured party has had an opportunity to apply to the State Court to revise the decree. This question has been determined adversely to the appellant by the Supreme Court”. (Citing cases).

In this case plaintiff delayed for seventeen months in bringing action, and the court held he was guilty of laches, and farther that no excuse relieved the party from applying to the State Court.

Rothchild v Memphis R. R., 113 Fed. 476.

This was sale of corporate property purchased by trustee who expended money in the improvement of the property. A minority stockholder waited seventeen months and then brought suit, and the Court held his action too late. The Supreme Court refused to review the decision. 188 U. S. 740.

The Supreme Court has held that a delay of six months is unreasonable, the party having knowledge of the facts.

Indianapolis R. M. v St. L. F. S. & W. R. R., 120 U. S. 256.

If the complaining party knows the facts the court will hold him guilty of laches before the expiration of the statute of limitations.

Alsop v Riker, 155 U. S. 448, 460.

P. & L. A. I. Co. v C. I. M. Co., 178 U. S. 270.

“The fact that the venture proved successful after large expenditure creates no equity for this complainant. The skill, energy and money of that company developed a valuable property. It ought in justice to reap the benefit, and the complainant ought to be estopped to participate in the benefit, unless an unbending rule of law prevents” (citing cases).

P. & L. A. I. Co. v C. I. M. Co., 178 U. S., 270, 278.

NO EQUITIES WITH COMPLAINANT.

The plaintiff has shown no fraud or wrong in Black and Bell. If we even concede his claim, which we deny, he has not offered to restore Black and Bell to their former position or to contribute to the protecting and securing of the property. For him to thus gain advantage would, in equity, be a gross injustice. In speaking of the rule the court has well said (*Duncomb v N. Y. H. & N. R. R. Co.*, 84 N. Y. 199):

“The rule was adopted to secure justice, not to work injustice; to prevent a wrong, not to substitute one wrong for another *** Thus, the beneficiary may avoid the act of the trustee, but cannot do so without restoring what it has received. To cling to the fruits of the trustees dealings while seeking to avoid his acts; to take the benefit of his loan, and yet avoid and reverse its security, would be grossly inequitable and unjust. It would turn a rule designed as a protection, into a weapon of offense and injustice.”

Even where the action is to impress a constructive trust on property secured by a director through fraud offer and payment of the debt is essential to maintenance of the action.

Harpending v Munson, 91 N. Y. 650.

Even where fraud is shown equity requires that the corporation pay that which it has had the benefit of. "Any other terms would be unjust, and would make the court the instrument of this injustice."

Thomas v B. & B. R. Co., 109 U. S. 522, 526.

Porter v P. B. S. Co., 120 U. S. 649, 672.

Other cases directly in point are:—

Wheeler v Abilene N B. Co, 159 Fed. 391, 395.

Marks v Merrill P. Mfg. Co., 188 Fed. 850.

Burns v Burns, 137 Fed. 801.

San Francisco Water Co. v Pattee, 25 Pac. 135.

Mosier v Sinnott, 79 Pac. 742.

The Marks case is controlling here. The complaining party was asked to contribute, as he was in the present case, and he refused. The Court dismissed his action because he declined to join when opportunity was presented.

An offer to let Wheeler participate in bid
See U. S. v. Boyd, 228 U. S. 508 opinions

Appellant invokes the maxim, "He that has committed iniquity shall not have equity" and cites 80 U. S. 517, and other cases bearing on the rule. We submit that the appellant fails to comprehend the reason of the cases. In the case cited the complainant was the fraudulent actor and brought his action asking equity to relieve him from his own wrong. "Iniquity" means absence of fair dealing and under the circumstances here prevailing the maxim justly applies to this complainant.

But appellant says the question of paying Black and Bell can await the final decree. It would be vain for the

court to direct the corporation to pay when complainant contends it does not exist, and the proof shows it is without assets, funds or credit and the plaintiff refuses to aid. The court will not make idle and useless decrees.

XIV.

Complainant has ratified all acts of Black and Bell and the judgment in the State Court.

The complainant's bill as served demanded that the proceedings in the State Court be declared void (page 17). This was March 20, 1912 (page 19). Eight months thereafter complainant asked that this relief be stricken from the prayer of the bill (page 22) so that the move was made after deliberate consideration. This was necessary because if a constructive trust was to be impressed on the title Black and Bell must have title. This waived all allegations of the invalidity of the proceedings in the State Court. If the complainant recognizes the title in this manner he must admit the source from whence it came. He cannot repudiate it and at the same time say he wants it. If the proceedings and sale are void Black and Bell hold nothing from the corporation and their application for patents is their sole property. This is too apparent to excuse discussion.

No wrong is charged or proven against Black and Bell for spending \$30,000.00 (principle and interest) to do annual assessment work, or for surveying and applying for patents. This could not be wrong for had they not ~~have~~ done it there would now be no claims and they would have been forfeited in 1908. There was no wrong in spending for machinery and development work the

\$30,000 in the notes in the state suit. The complainant is here asking that he be given the benefit of these expenditures. Surely there could be no justice in this if he is not to participate in the expense, and especially when he was asked to join and refused.

The complainant's election brings him within the well settled rule of law, that one cannot accept that which is a benefit to him, and repudiate that which is not. He must take it or leave it as he finds it and electing to take the benefit he ratifies everything that goes with it. It is especially applicable to a judgment.

Carll v Oakley, 97 N. Y. 633.

In Re N. Y. C. & H. R. R. Co., 60 N. Y. 112, 116.

Alexander v Alexander, 104 N. Y. 643.

XV.

On this appeal complainant has abandoned the theory on which he tried the case.

By reference to the opinion of Judge Neterer it will be seen that, upon the trial, no evidence of collusion was offered; there was no evidence that Black or Bell had any influence with the trustees; the evidence did show that complainant always knew the status of the company and urged the foreclosure, he now complains of (pages 78, 79). Complainant failed absolutely in his proof and in the briefs submitted practically abandoned the claim made in the bill. Upon the proof there was no other course open to him.

The evidence showed that in the year 1907 Black took an option on the Baldwin stock, notes and mort-

gage and sold same for \$30,000. Complainant, upon this, claimed that Black should have given this money to the corporation and had he ~~have~~ done so it would have had money with which to pay its debts. This appears from the opinion of the Court (pages 76 to 80) and complainant's counsel made this claim the controlling factor of the case (page 80). That claim is absolutely abandoned on this appeal.

Courts will not permit parties to speculate upon the trial nor permit them to submit their case on one theory and when defeated to repudiate such theory and seek relief on grounds ~~inconsistent with nor~~ not urged upon the trial.

Quimby v Carhart 133 N. Y. 579, 583.

XVI.

Appellant's Argument.

I.

Under this point appellant cites cases holding that where a court has not acquired jurisdiction, either by service of process or the appearance of the party, the judgment can be attacked when presented by one claiming a benefit under it. Surely a judgment rendered without such service or appearance would be a nullity.

The case here presented does not bring the appellant within the rule. The cases which he cites hold squarely that to attack the judgment direct proof must be made that the person against whom the judgment was taken was not served or did not appear.

Thompson v Whitman, 85 U. S. 464, 468.

Webster v Ried, 11 How. (U. S.) 460 opinion.

They are also authority to the effect that one may waive process and appear by an attorney. Shelton v Tiffin, 6 How. (U. S.) 186 opinion.

Here the company was served and admitted "due and timely service" (pages 121, 124) or proper service. Black was a trustee and general manager (page 99) and he employed Locke to appear for the company and look after its interest (page 95). Black was on the ground and as the other officers were in the east he was the one of all the officers to employ an attorney. It has long been settled that the general manager of a corporation can employ attorneys to represent it in all litigation.

Cook on stock, etc. 3rd Ed. Sec. 719.

10 Cyc 928.

~~Not only does the law presume~~ such authority in the general manager, ^{and} ~~but~~ no proof was offered in this case showing lack of such authority. We doubt the competency of such proof in view of the legal presumption, but if the appellant desired ^{to} here urge it the offer could have been made. It is evident from the appellant's brief that he preferred to speculate and charge wrong doing in preference to getting the facts. He is here urging that Black retained Locke for the sole purpose of giving the Court jurisdiction over the corporation; there is not a particle of proof to warrant the assertion. It was known to the complainant, at the time of the trial, that McNutt, as president, had directed Black to employ counsel to appear in the case and to defeat the action if that could be done, and in any event to keep down the expenses. The

complainant did not want this proof and as jurisdiction will always be presumed the defendants were not called upon to supply the proof.

After Locke was retained he carefully examined the complaint and records of the company and concluded there was no defense (page 95). Upon the trial of this action the complainant proved that the corporation had the money on the Baldwin notes (page 102) and that Locke was right in his conclusion that there was no defense.

Not only did Locke act the part of an honorable and honest man, but the receiver did likewise. Fogarty, as permanent receiver, was presented with protests from minority stockholders; he talked with these stockholders and their attorneys and personally examined the law on the questions raised; he also examined into all of the claims and the legality of them (page 97). Nor did he stop with this, but presented to the court a petition setting out the claims of these stockholders, and asking directions thereon (pages 141, 143). The receiver was directed to investigate and report on these claims (page 150) and did so (page 151), and in these proceedings Locke appeared for the corporation (page 150). All of the objectors and attorneys were heard by the court, on confirmation of the sale (page 165), and all matters had the fullest publicity, and Locke appearing for the company opposed all applications of the plaintiff's attorney.

Appellant's counsel asserts on his brief that Locke made an appearance to give the court jurisdiction and then entirely dropped out of the case. We regret the necessity of having to refute such an assertion. Locke acted as such attorney two or three weeks before filing

an appearance (page 96). He filed a written appearance Jan. 30, 1909, (page 130), and appeared on the trial when the decree was made by the court (page 131). He appeared before the court with minority objectors February 20, 1909, (page 150); on the notice to confirm the sale, April 1, 1909, (page 164), and, upon the final hearing of the confirmation of sale April 5, 1909 (page 165). The fact being that from the time Locke was retained he appeared until all proceedings in the action had terminated.

Again appellant calls attention to Locke's evidence at page 96 of the transcript. Locke here referred to his written appearance (page 130) and this entitled him to notice of all subsequent proceedings in the case. It may be fair for appellant to call the court's attention to this and then assert that it was the sole appearance, and hence attention is called to the personal appearances above given.

Appellant states that Black employed attorney Sandidge to bring the action in the State Court for Bell. We ask the Court's attention to the record on this (page 109). Bell personally employed Sandidge, and did not know that Locke appeared for the company or that Fogarty was receiver until March, 1909 (pages 109, 110). This is undisputed and it is submitted that Bell could not be guilty of collusion or fraud in acts which he knew nothing of.

An examination of the record shows that Locke appeared on every hearing in opposition to moves made by the plaintiff's attorney and ~~with~~ the receiver who was always acting under instructions from the Court. If Locke was acting in collusion with Bell why was he not in consultation with Bell's attorney? The record does not show

a single talk between Locke and Sandidge or correspondence between them. To have collusion there must have been some agreement and there is no evidence of this.

Appellant urges that the motion for a temporary receiver was returnable December 9, 1908, but not heard until the 10th. There is no evidence on this fact, but the record proof. These show that the motion papers were filed on the 9th (page 124). The order was made the 10th (page 127) and recites that the "cause came on regularly for hearing" (page 125), so it must be assumed that the moving papers were duly presented and filed on the 9th, as the record shows, and the application held or postponed to and acted upon the 10th. This is the usual course and a proper practice. The papers having been filed on the 9th gave the Court jurisdiction of the application and it could hold or adjourn the motion as it saw fit.

The appellant urges that the permanent receiver never gave a bond, and because thereof he had not power to sell. This contention overlooks the record. The bond given by the temporary receiver was conditioned for "performance of the trust reposed in him by said order (temporary receiver) or that may be reposed in him by any other order or decree in the premises" (page 128). The "premises" referred to the action of Bell against the corporation (page 127) and there could be but one "decree" in the action and that for a receiver and sale of the property as prayed for in the complaint (page 118). There was but one decree in the action (page 131) which provided for the bond and approved the one already in the case (page 133) and which clearly covered the case. The object of the bond is that the receiver have a surety and

in the bond given by the Surety Company it stood as surety for Fogarty for any trust to be reposed in him by any order or decree which the court made, past or future. The bond given was clearly intended to cover the action to the end, and had Fogarty ~~have~~ defaulted as permanent receiver the surety would have been liable. The bond given fully covered the requirements, both in letter and spirit, and the surety could not escape liability on the ground urged by appellant or otherwise.

XVII.

Judgment should be affirmed with costs.

FRANK L. BELL,

Attorney in person for defendant Bell,

Glens Falls, N. Y.

No. 2572

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

G. J. BUCHLER,

Appellant,

vs.

W. W. BLACK, FRANK L. BELL
and SUNSET COPPER MIN-
ING COMPANY, a Corporation,
Appellees.

APPELLANT'S REPLY BRIEF.

Upon Appeal From the United States District
Court for the Western District of Wash-
ington, Northern Division.

O. C. MOORE,

Solicitor and Counsel for Appellant,
501 Peyton Building, Spokane, Washington.

GEORGE H. WALKER,

Solicitor and Counsel for Appellant,
705-6-7 Central Bldg., Seattle, Washington.

Filed
COLE PRINTING COMPANY

MAY 10 1915

F. D. Monckton,

No.

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Appellees.

APPELLANT'S REPLY BRIEF.

Upon Appeal From the United States District
Court for the Western District of Wash-
ington, Northern Division.

I.

Concerning the question of jurisdiction, the first proposition discussed in the opposing brief, we beg to call attention to the fact that the finding contained in the order appointing the receiver in respect to the service of process contains not only the

language quoted by appellees but in full is as follows:

“And it appearing from the files and records herein that due and legal notice of this application, together with a true copy of the summons and complaint herein and of the affidavit used upon this hearing, having been duly served upon the defendant, the Sunset Copper Mining Company, and that no answer, demurrer or objections to this application have been filed or made.” (Tr. p. 125.)

The language quoted shows that the court in said order appointing a receiver based its claim of jurisdiction on the “files and records” in the case and the question of whether the court had jurisdiction must be confined to an investigation of those files and records, and the only service disclosed is that made in the State of New York which, under all the authorities, was not sufficient for any purpose. That the inquiry will be confined to the record where the order or decree in question recites that it is based thereon is the universal rule.

Galpin vs. Page, 18 Wallace 350.

Johnson vs. North Lumber Co. (9 Cir). 206
Fed 624, 629.

Foster vs. Milburn, 202 Fed. 175.

Speaking on this point in *Galpin vs. Page*, above cited, it is said:

“When, therefore, the record states the evidence or makes an averment with reference to a jurisdictional fact, it will be understood to speak the truth on that point, *and it will not be presumed* that there was other or different evidence respecting the fact, or that the fact was otherwise than as averred. If, for example, it appears from the return of the officer or the proof of service contained in the record, that the summons was served at a particular place, and there is no averment of any other service, *it will not be presumed that service was also made at another and different place*; or if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also. Were not this so it would never be possible to attack collaterally the judgment of a superior court, although a want of jurisdiction might be apparent upon its face; the answer to the attack would always be that, notwithstanding the evidence or the averment, the necessary facts to support the judgment are presumed.” (Italics ours.)

Furthermore, the complaint alleges (Tr. pp. 10, 11):

“That although there was a pretended service of summons in this suit upon Henry C. McNutt as President, in Glens Falls, New York, there was as a matter of fact, no proper or sufficient service had on the defendant corporation; * * * That the entire proceeding (Bell vs. Sunset Copper Mining Company) is null and void for the reason that *no personal service was had on the defendant cor-*

poration, and that there was no service, or attempt at service, by publication."

The answer of Black Paragraph 10 (Tr. pp. 30, 31), admits there was no service by publication, but alleges on the contrary that the service was actually made on Henry C. McNutt in Glens Falls, New York. Defendant further alleges:

"That at the time of the commencement of said action in the Superior Court of Snohomish County, being numbered 9510, a copy of the summons and complaint was duly served upon H. C. McNutt, who was then the President of the Sunset Copper Mining Company; that said service was made in the State of New York, and at the said time the said H. C. McNutt made an acknowledgment in writing as follows, to-wit:

'The above named defendant by H. C. McNutt, the President, does hereby acknowledge due and timely service of the foregoing summons and complaint. Dated November 30th, 1908. H. C. McNutt, President of Sunset Copper Mining Company, a corporation,' which written acknowledgment was attached to the summons and complaint in said action numbered 9510."

In view of the above admissions and allegations of the answer, and in view of the fact that said record does not show any service other than that on the President of the Company in the State of New York, there was no occasion for the introduction of testimony to establish the absence of

any proper service of process, and the order of court referring to the record in support of its jurisdiction was very clearly entered without jurisdiction.

II.

The contention made in Chapter VI of the opposing brief that this suit cannot be maintained because "the Transcript shows that the corporation did not appear in the action and there was no proof of service upon it," is wholly untenable under the conditions existing in the case at bar. The return of the service of the subpoena made by the United States Marshal is as follows:

"I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with W. W. Black personally at Everett, Western District of Washington, on the 27th day of March, 1912, and after due and diligent search I have been unable to find the within named Frank L. Bell and Sunset Copper Mining Company in this district."

The record herein also shows (Tr. 181) that the corporation was allowed by its manager, Black, to forfeit its charter and that it ceased to have any legal existence on the 23rd day of August, 1909, hence the marshal was entirely correct in the statement found in his return that the Sunset Copper Mining Company was not to be found within the district. We, nevertheless, contend that, even

had the company been in legal existence at the time of the institution of this suit, the appellees would be estopped from claiming that no service had been made on it, since the return of the marshal shows that personal service was made upon Black, who was at all times during the life of the corporation a trustee and its general manager. A person occupying such official positions with a corporation cannot, we submit, be allowed to contend that the personal service upon him of a subpoena directed not only to himself but to his corporation, did not constitute service upon the corporation, but was intended for himself alone. We confidently submit that the contention of a trustee and general manager joined with his corporation as a defendant in a legal proceeding, that the personal service of process upon himself directed to all the defendants was intended for himself alone and not for the corporation, would of itself constitute the strongest kind of evidence of fraud. Had the proposition advanced any merit, which as we shall present show it has not, the appellees would be estopped from successfully urging it under the circumstances disclosed in this case.

Under another head, we shall presently show that a stockholder may maintain a suit against persons wrongfully in possession of the assets of a defunct corporation to the same effect as if the corporation were in actual existence.

III.

The allegations of the bill and the evidence introduced thereunder discloses a condition entirely obviating the requirements of equity rule 94, which was in force at the time this suit was begun, and which, with some modifications, has been incorporated in the new rules as rule 2~~7~~. The bill alleges, Paragraph 25 (Tr. p. 16):

“That ever since the transfer and assignment of the 1,250,000 shares of stock by the said Ellen C. Baldwin to the said Frank L. Bell, the said defendants W. W. Black and Frank L. Bell, have owned and controlled a majority of the outstanding stock of the defendant corporation, and that they have been ever since said time, and still are in the actual control of the said corporation; that so conspiring and confederating one with the other, they have operated and controlled the said defendant corporation solely for their own interest, and totally disregarded the rights and interests of the said defendant corporation, and the rights and interests of the minority stockholders.”

The answer of Bell and Black (Tr. pp. 36-57), both admit the ownership by them of a majority of the capital stock of the corporation, and since Black, as one of the trustees and general manager, was the perpetrator and beneficiary of the wrong complained of, and since McNutt, as President, by his conduct in pretending to accept service of

process and thereafter failing to take any steps for the protection of the rights of the Company, had shown himself in league with Bell and Black, or, at least, indifferent to the interests of the Company and its stockholders, it would obviously have been unavailing to make a formal demand upon officers of the Company to take any legal action. In the case of *Doctor vs. Harrington*, the bill filed by a stockholder, alleged that the Board of Directors of the corporation was "under the absolute control and domination of the defendant, John J. Harrington, and that said Harrington, by reason of having the possession of the majority of the capital stock of said corporation" likewise controlled "the action of the stockholders," and said allegations were held, under the circumstances, to be a sufficient compliance with the rule.

Commenting and approving the rule announced in *Doctor vs. Harrington*, the Supreme Court in the later case of *Delaware & H. Co. vs. Albany & S. R. Co.*, 213 U. S. 435, said:

"The efforts that were made to secure the action of the managing directors or trustees were not 'set forth with particularity.' Nothing was alleged but the domination of John J. Harrington and his control of the directors. What he did, in what way he exerted control, was not alleged. In other words, the bill seemed to show a case, not of compliance with the requirements of rule 94, but circumstances which excused from such compliance."

Foster's Federal Practice (4th Ed.), Sec. 76, p. 397, discussing this question and citing many authorities, says:

"A previous demand is not required in a case where it clearly appears that the corporation would certainly refuse to bring the suit, and the demand would be a vain and useless act. For example: a bill by a minority stockholder to set aside a contract fraudulently made between his corporation and another in which a majority of his fellow stockholders are interested, need not allege a previous demand upon his board of directors to bring the suit and their refusal when it shows that such board has been elected by the hostile majority for their own interest."

We therefore contend that the allegations of the complaint are entirely sufficient under the above quoted decisions.

Again, the requirements of rule 94 are not jurisdictional, and a failure of the complaint in that regard does not affect the validity of a decree where the question is not raised in a timely manner, and where the question is raised in a timely manner, the court will always permit an amendment.

"This rule in the federal courts requiring stockholders to endeavor to have the corporation bring the suit and to allege what steps he has taken in that direction, does not raise a question of jurisdiction, but of the authority of the plaintiff to maintain the suit. It may

be raised by demurrer. A failure, however, to allege such facts does not prevent jurisdiction attaching."

Cook Corporations (6th Ed), Sec. 740, pp. 2471, 2474.

See also

Illinois, Etc., R. Co. vs. Adams, 180 U. S. 28.

That questions as to defects in a complaint, not jurisdictional, must be raised by demurrer or answer, and if not so raised are deemed to have been waived, is the holding of all authorities:

"Advantage can be taken of most defects in a bill by answer, as well as by demurrer. But objections to defects in the form of a bill, except possibly those which are required by the equity rules, can only be raised by demurrer."

Foster's Federal Practice (4th Ed.), Sec. 110, p. 485.

Furthermore, the rule does not apply where the corporation has for any reason been dissolved or its officers have become incapacitated to act.

Discussing this phase of the questions, *Foster's Federal Practice* (4th Ed.), Sec. 76, p. 395, says:

"It does not apply to suits brought by the stockholders of a corporation after its dissolution. Nor to a case where the corporation

has made a general assignment for the benefit of its creditors, and the assignees in insolvency has refused to bring the suit. Nor, it has been held, to a suit by a stockholder alleging that his corporation has ceased actively to conduct its business and to elect officers and directors, praying the appointment of a receiver and a winding up of its affairs."

Lafayette Co. v. Neely, 21 Fed. 738;

Briggs v. Traders' Ins. Co., 145 Fed. 254;

Taylor vs. Holmes, 127 U. S. 489;

General Electric Co. vs. West Asheville Imp-Co., 75 Fed. 386;

Boyd vs. Hankinson, 92 Fed. 47.

Turning now to the evidence, we find from the certificate of the Secretary of the State of Washington, complainant's Exhibit "Q" (Tr. 173), that the last license fee paid by the corporation was on June 30th, 1905. From a letter of the Secretary of State, defendants Exhibit 21 (Tr. 181), we find that the corporation ceased to exist on August 23rd, 1909, on which date it was stricken from the records for failure to pay its annual license fee as required by statute. Thus, we find that the corporation, through the negligence of its officers, Black being general manager, was permitted to die and ceased to have any legal existence within a few months after the confirmation of the receiver's sale. This obviously was a part of the general plan of Black in his scheme for the absorp-

tion of the assets, which had at that time been accomplished. The evidence, therefore, discloses that there was no corporation to bring suit and, of course, if there was no corporation, there was no board of trustees on whom demand could have been legally made at any time subsequent to the 23rd day of August, 1909, on which date the corporation lost its corporate existence.

IV.

Under head number VII, appellees contend that the decree of dismissal must be sustained because of the omission from the bill of complaint of a distinct allegation that the suits brought by complainant on behalf of himself and others similarly situated were for the benefit of the corporation and its stockholders.

Our first answer to this contention is that appellees have waived this defect, if such it may be denominated, by their failure to in any way raise the question in their pleadings either by demurrer or answer. In support of this contention, we cite authorities cited by us in opposition to the contention that there has been a failure to comply with equity rule number 94.

We also call attention to Paragraph VII of the complaint (Tr. 4), wherein it is alleged that the appellant is and since 1902 has been the owner of

58,250 shares of stock, and then attention is invited to the following language in the prayer of the complaint (Tr. 18):

“That the said defendants, W. W. Black and Frank L. Bell, be declared to be trustees for and in behalf of the said corporation and its stockholders, and be declared to hold all of the said property as trustees for the use and benefit of the said corporation, for its bona fide creditors and stockholders
* * * and that your orator may have such other and further relief as the equity of the case may require, and as to your Honors may seem equitable, proper and just.”

Also the testimony of the appellant (Tr. 104), where he said:

“Fearing that the properties would be entirely lost, I instituted this suit to safeguard the interests of the Company.”

In view of the above allegations and testimony of the appellant, it seems to us little less than frivolous that questions should now be raised for the first time in respect to the purposes of appellant, by whom this suit was brought. Surely a court of equity which looks not at all to the form but to the substance of things, with a view to granting such relief as the conditions may require, will not hold that this suit, wherein it is sought to have appellees “declared to be trustees for and in behalf of the said corporation and its stock-

holders, and be declared to hold all of the said property as trustees for the use and benefit of the said corporation, for its bona fide creditors and stockholders," cannot be maintained, because it is not recited in the preamble to the complaint that the suit is instituted by the complainant for the use and benefit of those in like situation with himself. If a money judgment were demanded as a part of the relief in this suit, it might be possible to advance a plausible argument in support of this contention, but since appellant asks nothing on his own behalf but only for the corporation and its stockholders, no possible doubt can exist as to his purpose in bringing this suit, nor would it be possible for him to in any way gain a personal advantage different from that of the other stockholders by waging this litigation.

V.

As to the contention made under head VIII of appellee's brief, that appellant failed to show that he was injured by the sale of the assets of the Company, and that there was no evidence in the record that the property is worth a single dollar, we call attention to the allegation in Paragraph V of the complaint (Tr. 4), which is as follows:

"That certain mining property hereinafter described and now held and claimed by the defendants, W. W. Black and Frank L. Bell,

is the matter in controversy in this suit; that the matter in controversy greatly exceeds in value the sum of Three Thousand (\$3000.00) Dollars, exclusive of all interest and costs."

The above allegation of the complaint is admitted by the answers of both Black and Bell (Tr. 24 and 49). Again, it is alleged at the end of Paragraph XXIV of the complaint (Tr. 16):

"That the value of the property in question greatly exceeds the sum of \$40,000.00."

In respect to this allegation, Black, at the end of Paragraph XXVII of his answer (Tr. 36), says:

"That the defendant * * * denies that the value of the property in question will exceed the sum of \$40,000.00."

This denial, under the rules of pleading, must be deemed an admission that the property is of a value of \$40,000.00, though not in excess of that amount. That there was evidence introduced at the trial as to the value of the property for some purpose is evidenced by the following statement in the written opinion filed by the trial court (Tr. 79), where it is said:

"There is no direct evidence before the court as to the value of this property as mineral land."

Therefore, it must be obvious to this court that

there was evidence in regard to the value of said land for other purposes.

This appeal is prosecuted by appellant Buchler and not by Black and Bell. The appellant, therefore, in compliance with the requirements of the practice, filed certain assignments of error which he believed to have been committed by the trial court, and in condensing the record as required by rule 75 of the new equity rules, in an endeavor to comply with the requirement of that rule, very naturally omitted therefrom all portions of the testimony not necessary in connection with the argument of the assignments of error made by him. Subdivision B of said equity rule 75, in respect to the preparation and reduction of the record on appeal, contains the following:

“The evidence to be included in the record shall not be set forth in full, but shall be stated in simple and condensed form, *all parts not essential to the decision of the questions presented by the appeal being omitted* and the testimony of witnesses being stated only in narrative form, save that if either party desires it, and the court or judge so directs, any part of the testimony shall be reproduced in the exact words of the witness.”

The certificate to the statement of facts of Judge Neterer, before whom the case was tried below (Tr. 112, 113), is as follows:

“I hereby certify that the foregoing state-

ment contains in a simple and condensed form, a true, complete and properly prepared statement of the oral testimony upon which the final decree and the decree denying Petition for Re-Hearing herein was based; and that it, together with the following Exhibits and parts thereof * * * constitutes all the evidence essential or necessary to a review and decision of said cause on appeal."

The language quoted from the opinion of Judge Neterer in connection with his certificate to the condensed record, above quoted, makes it entirely clear that not all the testimony is included in the Transcript, but only such portions as are necessary for a review of the questions discussed in the written opinion of the trial judge, and in the absence of the entire testimony, this court cannot, we respectfully submit, give consideration to any other questions than those discussed in Judge Neterer's written opinion, all of which, but none other, are fully covered by appellant's specifications of error.

It is obvious, at first blush, that testimony introduced at the trial in respect to the value of the property is not necessary in support of the questions raised by appellant under his assignments of error, and since no cross-appeal has been taken by appellees, we do not believe that they can now be heard to make the argument advanced by them.

Furthermore, equity rule 76 provides:

“If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by a supplemental transcript.”

We therefore suggest that if this point be deemed of any importance, this court direct that any evidence introduced at the trial in respect to the value of these properties be set up as a supplemental record, in pursuance of rule 76.

To the contention that there is no showing that appellant, the corporation or any of the stockholders have been injured by the absorption of the assets by Black and Bell, there are many answers, but we shall content ourselves at this time with a suggestion that Black and Bell have obviously gained an advantage over the other creditors by buying in the properties in satisfaction of their demands, even should it be admitted that their claims were just and proper. The fact, however, that the judgment of \$12,767.57 obtained by Bell in New York, wholly without jurisdiction, and the judgment obtained by him in the State of Washington in the receivership suit, likewise without jurisdiction, were absolutely void; consequently, it cannot be said that the record shows that the appellees paid anything for the property

other than the \$2000.00, which the receiver claims to have received, concerning the disposition of which money, the receiver, if he did in fact receive same, has, as pointed out in our opening brief, made no accounting to the stockholders or the creditors of the corporation.

Another element of damage to the appellant, the corporation and all its stockholders, is, as pointed out in our opening brief, that, in consequence of the property having been sold by a receiver instead of the regular course of foreclosure, they have been deprived of the right of redemption. Again, the statutes of Washington require sixty days' notice for the sale of any interest in real property on foreclosure, while the order of court, under which the receiver acted in the present instance, only required a notice of four weeks (Tr. 146), and the receiver's report of the sale states that the sale was had on the notice required by the court. The order of court directing the sale was entered on February 15th, 1909 (Tr. 147), and the sale was held on March 20th, 1909. In other words, the notice required by the court for the receiver's sale was less than half the time which would have been required had the foreclosure proceedings taken an orderly course.

VI.

In subdivision **13** of appellees' brief, in connection with the question of laches, is presented a long and involved discussion of portions of the testimony. Most of the testimony discussed and the deductions drawn therefrom, being, as we view the case, entirely irrelevant to any issue presented by this appeal. Time and space forbid a detailed analysis of appellees' argument on this and many other points covered by their brief, but a single instance will serve to indicate how inaccurate are the statements made and how unfair the inferences sought to be established, to-wit, the statement that "after the sale, Black and Bell held a meeting with *the other stockholders* and offered to let them come in and share in the bid on the basis of \$40,000.00, Bell offering to throw out his judgment recovered in New York and to lose his services. Bell offered to do this upon the trial (Tr. 110) and Buchler would not even accept this offer." The inference to be drawn from the above quoted statement is, that the meeting referred to was with all the stockholders held after due notice and for a stated purpose, yet on turning to page 110 of the Transcript, cited by appellees in support of the statement quoted, we find the following:

"After that in Everett we had a meeting

with a number of the stockholders, when Judge Black, in behalf of himself and myself, offered to allow all stockholders to come in and share in this bid, paying on the same basis that we did, Forty Thousand Dollars. I was present at the meeting and assented to it and would assent to it now. In making that offer, I offered to throw off Ten Thousand Dollars represented by the judgment I had obtained in New York."

From the testimony quoted, it is obvious that the stockholders' meeting referred to was only casual and attended by only a few stockholders, since the language is that "we had a meeting with a number of the stockholders." Certainly it was not a general or formally called meeting, held for a stated purpose, and any proposition which Bell or Black might have brought forward at such a time could not have the slightest bearing on the legal rights of any other stockholder or even on the stockholders in attendance, nor on the corporation or its creditors.

In many of the cases cited on the question of laches, a change in the condition of the parties or property or intervention of the rights of third persons rendering it impossible to do equity where the actuating causes which prevented the court from granting relief rather than the lapse of time which, as pointed out in our opening brief, is never, standing alone, a matter of serious consequence in an equity suit in the federal court.

Other cases cited, particularly those from this circuit, were brought for the purpose of directly annulling and vacating state court judgments where relief of the same character could have been had at law in the court by application to the court in which the judgment was rendered. In this case, however, it is sought to charge defendants with a constructive trust and no change or intervening rights have occurred which would prevent doing of substantial equity between all parties concerned. As said by the Supreme Court in *Johnson vs. Waters*, 11 U. S. 640, after observing that a court of chancery is always open to hear complaint against fraud, whether committed in pais or by means of judicial proceedings, said:

“In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it.”

It is also contended that the complaint is defective in that the appellant does not specifically offer to do equity or to restore Black and Bell to their former positions.

This contention overlooks the prayer of the complaint for such equitable relief as the court may

find proper and just. It also overlooks the fact that the appointment of a receiver is sought for the purpose of doing equity between all the parties concerned. Another reason why such an offer is not necessary is that this is a suit by a minority stockholder for the use and benefit of the corporation and other stockholders and creditors, and the authorities hold that an offer to do equity or to make any restoration to the defendant is not necessary in such a suit, for the reason that the complainant did not himself receive any personal benefit whatever from the transaction in question, nor the possession or control of any of the fruits thereof.

In the case of *Edwards v. Mercantile Trust Co.*, 124 Fed. 381, 389, 390, 391, discussing this point, it is said:

“If the transaction was fraudulent, both companies were parties thereto, and perhaps neither could maintain an action to set it aside. But the complainant, a stockholder and income bondholder of the Bay State Gas Company of Delaware, is not in this position. He was not a party to the fraud, and may not he and other stockholders and bondholders undo the wrong done to them by the fraudulent transaction without first requesting the Bay State Gas Company of Delaware to return the bonds issued by the New Jersey Company? It is, of course, true that he who seeks equity must do equity, and it is a condition precedent to the rescinding of a fraudulent or ultra vires

act that restitution be made of the fruits of the transaction relieved against. * * * The complainant could not offer to return the \$1,300,000 of bonds he is not in possession or control thereof, and, the company having refused to bring the suit, it would have been a vain thing for the complainant to have requested it to offer to return the \$1,300,000 of bonds. The law does not require a party to do a vain thing."

For a full discussion of this question, see also:

Citizens' Savings & Trust Co. vs. Illinois Central Railroad Co., 182 Fed. 607;

Johnson vs. Forsyth Mercantile Co., 127 Fed. 845, 848;

Hosmer vs. Wyoming Railway & Iron Co., 129 Fed. 883.

VII.

In Chapter 14 of their brief, appellees contend that, by the elimination from the prayer of the complaint the demand that the proceedings in the state court in the case of Bell vs. The Company, "be set aside and canceled" by the federal court, constitutes a ratification of the acts of Black and Bell. This contention does not demand serious consideration, but we will say in passing that said language was eliminated from the prayer so that there might not be any ground for doubt that this is an equity suit in *per sonam* for the pur-

pose of charging Black and Bell as constructive trustees and wresting from them the property the possession of which they have obtained, and to which they have a paper title only, through the wholly void and illegal proceedings in the receivership case. The amendment was made in view of the rule that, since under Section 720 of the revised statutes, 4th Fed. Stat. Ann. p. 509, federal courts may not proceed directly against or in any way revise the record of a state court, but will, nevertheless, take such action as may be necessary to deprive the beneficiary of a void state judgment of the benefit of his ill-gotten gains.

In *Marshall vs. Holmes*, 141 U. S. 589, 35 L. Ed. 870, in speaking of the authority of a Federal Court over the judgment of a state court, Mr. Justice Harlan said:

“While it cannot require the state court itself to set aside or vacate the judgment in question, it may, as between parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.”

See also:

Johnson vs. Waters, 111 U. S. 640;

Arrowsmith vs. Gleason, 129 U. S. 86, 32 L.
Ed. 630;

Schultz vs. Highland Gold Mining Co., 158
Fed. 337;

Also *Notes on this subject*, 4th Fed. Stat.
Ann., p. 5.

VIII.

In respect to the charge made in Paragraph XV of appellees' brief that we have abandoned the theory upon which the case was tried below, we beg to call attention to page 89 of the Transcript, where are set forth excerpts from the petition for a re-hearing presented by the appellant to the lower court. A glance at the brief portions of said petition contained in the Transcript will at once disclose the incorrectness that appellant has in any way shifted his position. Such an examination will disclose, on the other hand, that the points now urged upon this court were also, in due season, presented to the trial court. Again, this being an appeal in equity, this court will review the case *de novo* and give due consideration to any proposition advanced, provided it be within the contemplation of the assignments of error made by the appellant.

Other propositions urged by appellees, in so far as they are relevant, have, we believe, been discussed with sufficient fullness in our opening brief, while other points advanced by the opposition appear to us to be without merit or any bearing on the issues presented by this appeal.

We therefore urge that the decree appealed from should be reversed.

Respectfully submitted,

O .C. MOORE *and*

GEORGE H. WALKER,

Solicitors and Counsel for Appellant.

No. 2572

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

G. J. BUCHLER,

Appellant,

VS.

W. W. BLACK, FRANK L. BELL and SUNSET
COPPER MINING COMPANY (a corporation),

Appellees.

ANSWERING BRIEF OF APPELLEE, W. W. BLACK, TO APPELLANT'S REPLY BRIEF.

W. W. BLACK,

In Propria Persona,

L. L. BLACK,

ROBT. MCMURCHE,

Stokes Building, Everett, Washington,

Solicitors and Counsel for Appellee,

W. W. Black.

Filed this.....day of May, 1915

FRANK D. MONCKTON, *Clerk.*

By.....Deputy Clerk.

F. D. Monckton,
Clerk.

No. 2572

IN THE

United States Circuit Court of Appeals

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ANSWERING BRIEF OF APPELLEE, W. W. BLACK, TO APPELLANT'S REPLY BRIEF.

In answer to reply brief of appellant we desire to call attention to a few points as nearly every proposition is treated in our briefs.

I.

Technically the court of appeals can not say from the records that there was any defect in the service in the state court as the transcript does not pretend to set up the whole of the record in the state court. The transcript only purports to give "excerpts" (Tr. p. 114).

On the merits, however, all that can be claimed is that service was defective.

The rule laid down in 23 Cyc. 1075 d, referred to in appellee Black's brief, page 25, as well as Black on Judgments, sec. 223, page 271, fully disposes of that matter.

In Galpin v. Page, 18 Wallace, 350, a distinction is made as to judgments of courts where defendant resides in jurisdiction.

The Sunset Copper Mining Company was a Washington corporation residing in the county where action was pending.

Black's answer does not admit that there was no proper service. It admits that there was no service by publication. Publication was not proper as the defendant resided in the county where action was pending.

We contend that the record shows service that was valid. We also contend that as there was service of summons actually upon the president that imperfections in the summons or the manner of service does not authorize collateral attack (Black's brief, pp. 24, 25 and 26, and authorities).

We contend, also, that the general appearance by attorney Locke and the appearance of stockholders in the case for themselves and "other stockholders" cures defects, if any.

The instant case is one in equity and if this court finds that the judgment in the state court is righteous

and is one the court should make if all the parties were before it in the light of the evidence in this case, it will not in effect set aside the judgment in the state court, when it is evident that no court, when parties are before it, could render a different judgment.

It seems to us that even if there was a defect in the service in the state court, even though there had been no general appearance by the defendant by its attorney and by its stockholders and their attorneys, that as this is an action to have Bell and Black declared to be trustees, appellant can not be heard to say that they have no title. If no title they have nothing for which to be trustees (Black's brief, p. 28).

Beyond this, however, appellant can not be allowed to play fast and loose with the court.

He solemnly waived the point of no jurisdiction in state court, in writing, in the district court and can not now be heard to urge this point (Tr. p. 23).

II.

As to rule 94, counsel for appellant contends that their allegations in bill of complaint takes the case out of the rule.

We contend that mere allegations in bill, not sustained by at least some evidence, is not sufficient.

Why require allegations to be made if they do not need to be proven?

The authorities cited by appellant, therefore, are not in point.

Counsel can not be heard to now claim that the defendant corporation was defunct at the time his action was commenced, as he alleged it was an existing corporation then; the lower court found it was a corporation and in his opening brief he described it as an existing corporation (Tr. pp. 3 and 4).

This point being raised in his reply brief for first time.

III.

Appellant's reply brief (p. 15) makes the claim that appellant brought his action for himself and "other stockholders" because he testified: "I instituted this suit to safeguard the interests of the company".

We submit that the nature of the action must be determined from the pleadings, not by some statement of a witness.

IV.

Pages 16 and 17 of appellant's reply brief claims appellant showed he was injured because appellees admitted that property was worth \$40,000.00.

If the company's property was worth \$40,000.00 and it owed \$64,000.00, the stock was worthless at the time

Bell brought his action and when the property was sold. It is still worthless as the debt has increased.

Putting back the property subject to the debts would not give stock any value.

The property was sold in strict conformity of the laws of Washington by a receiver of an insolvent corporation, the Washington laws expressly providing for this as shown in our brief.

Bell and Black, after the sale, offered to allow stockholders to participate in the bid of \$40,000.00. Counsel for appellant complains that this was not done at a meeting regularly called and that Buchler was not there. Buchler knew of the offer and the meeting as shown by the testimony as detailed in our brief.

Bell and Black did not want the property but were forced to take it or lose their valid claims.

Appellant in an equity court is relying wholly upon technicalities and does not suggest that equity be done.

He wants a receiver to be appointed, knowing that the fees of receiver and of his attorneys will consume a good portion of the property and injure Bell and Black because this expense must come from the property.

He knows a receiver will not help stockholders but hopes it will injure Bell and Black.

We submit an equity court will not appoint a receiver when it is evident the property is not sufficient to pay the debts when it is self-evident the sole purpose is to add to the expenses of Bell and Black who continued to

advance money to the corporation when everyone else refused to aid it.

Respectfully submitted,

W. W. BLACK,

In Propria Persona,

L. L. BLACK,

ROBT. MCMURCHE,

Solicitors and Counsel for Appellee,

W. W. Black.

IN THE
United States Circuit Court of Appeals
FOR THE
NINTH CIRCUIT

G. J. BUCHLER,

Appellant,

vs.

W. W. BLACK, FRANK L. BELL
and SUNSET COPPER MINING
COMPANY, a Corporation,

Appellees.

REPLY TO BRIEF OF APPELLEE BLACK.

Upon Appeal From the United States District Court for
the Western District of Washington,
Northern Division.

Filed

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No.-----

IN THE
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G. J. BUCHLER,

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REPLY TO BRIEF OF APPELLEE BLACK.

Upon Appeal From the United States District Court for
the Western District of Washington,
Northern Division.

NO DEFEAT OF PARTIES.

The answer brief of Appellee Black not having reached the hands of the writer until the day before the oral argument we desire now to reply very briefly to two points brought forward therein.

It is contended in Black's brief, page 16, that the

Sunset Copper Mining Company was an indispensable party, and that the decree of dismissal must be sustained because process was not served on said company.

In our reply to Bell's brief (p. 7) we called attention to the return of the marshal (Tr. 21), to the effect that he was unable to find said corporation in the district, though by said return it is shown that personal service was made upon Black. On the same page of our reply to Bell's brief attention is called to the fact that the corporation was, in fact, dissolved before the institution of this litigation (Tr. 181).

Should the correctness of the rule contended for be admitted, yet the situation presented affords an exception to the general rule. In 10 Cyc. at page 997 the exception is stated as follows:

"An exception to the foregoing rule, rendering it necessary to make the corporation a party defendant, may possibly be admitted where the corporation has suffered a de facto dissolution; but it would seem that its presence as a party defendant cannot be dispensed with unless it has suffered such a dissolution as disables it from suing or defending as a corporate body."

That a practically dissolved corporation is not an indispensable party to a suit by a minor stockholder for the recovery of the assets of the corporation is held in *Ervin v. Oregon Ry. & Nav. Co.*, 20 Fed. 577, 581. The question here presented is discussed at considerable

length and though the corporation in that case was not actually dissolved, the assets having gotten into the hands of the majority stockholders the rule was held inapplicable.

It must also be borne in mind that the Sunset Copper Mining Company is named as a party defendant and the return of the marshal shows that a bona fide attempt was made to serve it with process. Process was personally served on Black, and since he was the only trustee residing within the state (Black's brief, p. 2) he was thereby estopped from claiming that the corporation was not served. The requirements of the law were thereby fully satisfied.

"Filing a bill and taking out a subpoena and making a bona fide attempt to serve it have been deemed to be the commencement of a suit in equity as between the parties to it. There are cases, however, which hold that a suit in equity is commenced at the date of filing the bill."

1 Cyc. 750.

Attention is also called to Sec. 737 U. S. Revised Statutes, which is as follows:

"When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of, nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered

therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

We also call attention to rules 22 and 47 of the old equity rules under which this suit was instituted, and likewise to rules 39 and 44 of the new equity rules relating to the question of parties. Rule 44 of the new equity rules is as follows:

"If a defendant shall, at the hearing of a cause, object that a suit is defective for want of parties, not having by motion or answer taken the objection and thereby specified by name or description the parties to whom the objection applies, the court shall be at liberty to make a decree saving the rights of the absent parties."

It seems to us that the contention of Black on this point was conclusively disposed of by the Supreme Court in the recent case of *Waterman v. Canal-Louisiana Bank & T. Co.*, 215 U. S. 33, where in a suit by an heir against an executor and other heirs for the recovery of certain assets of the estate it was held that a non-resident heir on whom service could not be made was not an indispensable party in such a sense as to deprive the court of jurisdiction. The court said:

"The relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affect-

ing the rights of such absent party. 1 Street, Fed Eq. Pr., 519.

If the court can do justice to the parties before it without injuring absent persons, it will do so, and shape its relief in such a manner as to preserve the rights of the persons not before the court. If necessary, the court may require that the bill be dismissed as to such absent parties, and may generally shape its decrees so as to do justice to those made parties, without prejudice to such absent persons. *Payne v. Hook*, 7 Wall 424, 19 L. Ed. 260.

Applying these principles to the case at bar, we are of opinion that the presence of Frederick T. Davis as a party to the suit is not essential to the jurisdiction of the Federal Court to proceed to determine the case as to the parties actually before it. In other words, that, while Davis is a necessary party, in the sense that he has an interest in the controversy, his interest is not that of an indispensable party, without whose presence a court of equity cannot do justice between the parties before it, and whose interest must be so affected by any decree to be rendered as to oust the jurisdiction of the court."

Discussing this question at considerable length, in the case of *Silver King Coalition Mines Co. v. Silver King C. M. Co.*, 204 Fed. 166, 169, Judge Sanborn defines an indispensable party as follows:

"An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically

and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Every other party who has any interest in the controversy or subject-matter which is separable from the interest of the other parties before the court, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them, is a proper party to a suit. But he is not an indispensable party, and if his presence would oust the jurisdiction of the court the suit may proceed without him."

The general principles underlying and controlling the application of the rule, contended for, was discussed by this court in the recent case of *Continental & C. T. & S. Bank v. Corey Bros. Const. Co.*, 208 Fed. 976, 981. The question was also thoroughly discussed by Judge Ross in the earlier case of *MacRay v. Gabel*, 117 Fed. 873, to which attention is now respectfully invited.

It should also be borne in mind that the trustees of the Sunset Copper Mining Company are, with the exception of Black, admittedly non-residents of the State of Washington (Black's brief, p. 2). The only rights, if any, vested in said trustees under Sec. 3715d, Rem. Bal. Code, cited by Black, is of an equitable nature for the benefit of the corporation and its "stockholders and creditors to be disposed of under appropriate court proceedings." It therefore appears that whatever right may be vested in said trustees is by

the express terms of the statute subject to the control and disposition of the court. Certainly neither these trustees nor the corporation which they represent can be injuriously affected by any decree which the court may make in the pending cause. If the decision of this court should be favorable to the complainant, then the corporation and its stockholders would be beneficially affected, while an adverse decision would only leave the property where it now is and no right or interest vested in said trustees could be in any wise affected by a decree in this cause since they are not parties thereto, and it seems to us that this court cannot go further, in any event, than to require said trustees to be brought in before a final disposition is made of the assets, should the decree appealed from be reversed.

A COMPLETE DEFENSE EXISTS TO THE NOTES AND MORTGAGES SUED UPON BY BELL.

In his brief filed herein, Black repeats the assertion theretofore made by him, as pointed out in our opening argument, that there was no defense to the Baldwin notes and mortgages upon which was based the suit by Bell wherein the assets of the company were sold to the appellees. This statement was also reiterated by Black in his oral argument before this court.

While the question whether there was or is a defense to said notes and mortgages obviously is not now

an issue and cannot be here tried out, the proposition may have a bearing and be worthy of remote consideration in determining the relative equities and the good faith of appellant in instituting and prosecuting the suit at bar.

We therefore call attention at this time to the fact that the complaint not only alleges that said notes and mortgages were fraudulently executed without consideration, but further alleges (Tr. 6) that several hundred thousand shares of stock were issued by the company to Mrs. Baldwin for which she did not pay in excess of two and one-half cents per share, though said stock was of a par value of \$100 per share. In paragraph six of his answer (Tr. 26) this allegation of the complaint is admitted by Black:

Section 4, Article 22, of the Constitution of Washington provides:

“Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon this liability.”

It is not disputed that Bell took said mortgages subject to all outstanding defenses, and he now holds said obligations, as we understand, for the use and benefit of Mrs. Baldwin as her attorney and confiden-

tial agent and adviser. Clearly therefore and beyond dispute, it seems to us, the corporation was entitled, under the Constitution of the State of Washington, to receive the full par value from Mrs. Baldwin for the stock so issued to her, now held by Bell, and the indebtedness so created is now a defense to and should be offset against said mortgages in the hands of Bell.

As stated in the outset, this question cannot be finally determined by this court in the pending suit, nor was it foreclosed in the receivership suit, if we be correct in our contention that all proceeding had therein were void for want of jurisdiction, but on a reversal of the decree appealed from and the appointment of a receiver, the way would be open for the presentation of these demands by Bell in such manner as to permit of the proper determination of the questions suggested.

Respectfully submitted,

O. C. MOORE and

GEORGE H. WALKER,

Solicitors and Counsel for Appellant.

7

No. 2573

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

R. C. BELL, MARY A. BELL and AMERICAN
SURETY COMPANY OF NEW YORK, a Corporation,

Appellants,

vs.

MARY E. C. MORLEY and FRED MORLEY,

Appellees.

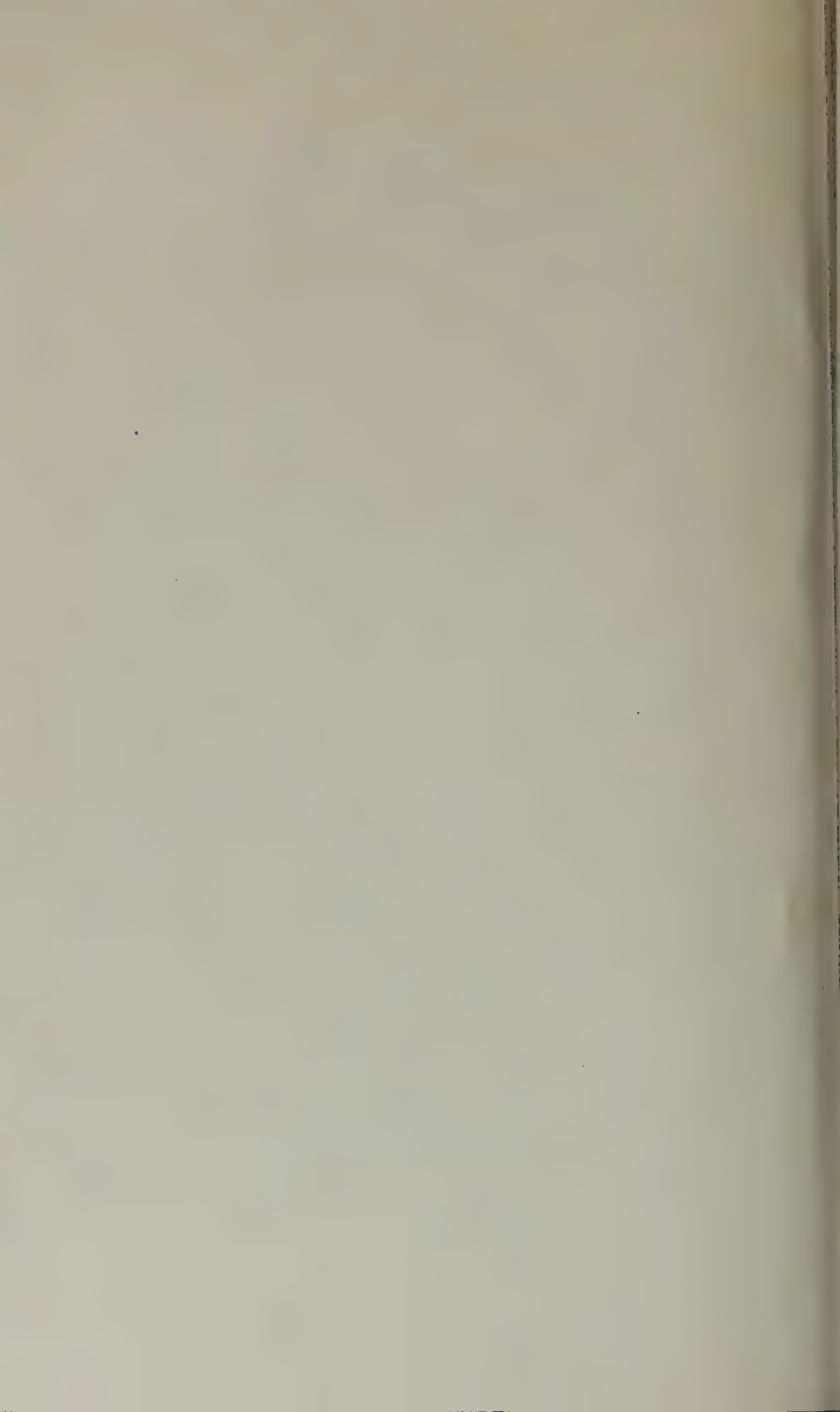
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Upon Appeal from the United States District
Court for the Western District of
Washington, Southern Division

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F. D. Monckton,
Clerk.



No. _____

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

R. C. BELL and MARY A. BELL,

Appellants,

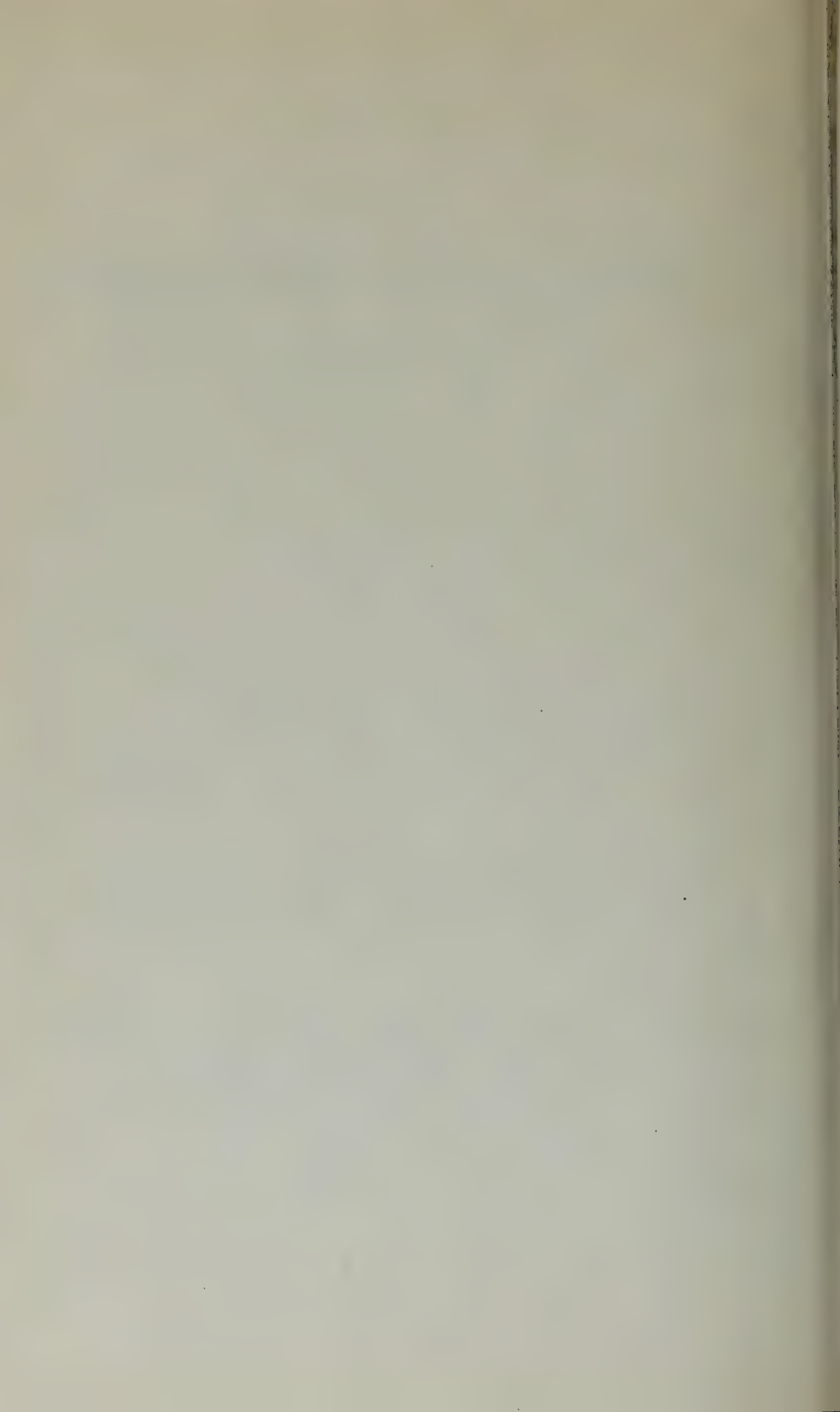
VS.

MARY E. C. MORLEY and FRED MORLEY,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District
Court for the Western District of
Washington, Southern Division



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Attorneys for the Appellees.

*In the District Court of the United States for the
Western District of Washington, Southern Division.*

MARY E. C. MORLEY and
FRED MORLEY,
Complainants,
vs.

R. C. BELL and
MARY A. BELL,
Defendants.

COMPLAINT IN EQUITY.

To the Honorable Judges of the District Court of the United States in and for the Western District of Washington, Southern Division:

Come now the complainants above named and, complaining of the defendants, for cause of suit, allege:

I.

That at all times herein mentioned complainants were and still are wife and husband and both citizens, residents, and inhabitants of the state of Michigan, residing at Lapeer in said state.

II.

That at all times herein mentioned defendants were and still are husband and wife and both citizens, residents, and inhabitants of the state of Oregon, residing in the city of Portland, said state.

III.

That this is a suit between citizens of different states, to-wit: between complainants, citizens, residents, and inhabitants of the state of Michigan, and defendants, citizens, residents, and inhabitants of the state of Oregon, and is a suit to foreclose a mortgage in favor of the complainants and executed and delivered to the complainants by the defendants upon real property within the Western District of Washington, Southern Division.

IV.

That on the 22nd day of April, 1912, the defendant, R. C. Bell, for a valuable consideration, executed and delivered to complainants his promissory note in writing, of which the following, in words, letters, and figures, is substantially a copy, to-wit:

“\$5625.00. Portland, Oregon, April 22nd, 1912.

On or before twelve (12) months after date, I promise to pay to the order of Mary E. C. Morley and Fred Morley Five thousand six hundred twenty-five Dollars for value received, with interest from date, payable at maturity at the rate of six (6%) per cent per annum, until paid, principal and interest payable in U. S. Gold Coin, at Lumbermen's National Bank of Portland, Oregon; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum of money as the Court may adjudge reasonable as attorney's fees in such suit or action.

(Sd.) R. C. BELL.”

V.

That no part of said indebtedness has been paid,

either principal or interest, except \$120.93 account of interest thereon paid May 26th, 1913, and there is now due and owing thereon from the defendant R. C. Bell to the complainants the full sum of five thousand six hundred twenty-five (\$5625), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less credit of \$120.93 account of interest thereon paid May 26th, 1913.

VI.

That, in and by the terms of said note, the defendant R. C. Bell promised to pay the complainants, in case suit were instituted to collect said note or any portion thereof, such additional sum of money as the court should adjudge reasonable as attorney's fees in such suit, and in that regard complainants allege that the sum of seven hundred fifty dollars (\$750) is a reasonable sum to be allowed complainants as attorney's fees in this suit.

VII.

That, at the time of the execution of said note, and to secure the payment thereof, both principal, interest, and attorney's fees, the defendants executed and delivered to the complainants their indenture of mortgage, in writing, of which the following exclusive of the names of witnesses and the details of the acknowledgement, is, in words, letters, and figures, substantially a copy, to-wit:

"THIS INDENTURE made this 22nd day of April, 1912, by and between R. C. Bell and Mary A. Bell, his wife, of the City of Portland, County of Multnomah, State of Oregon, here-

inafter called the parties of the first part, and Mary E. C. Morley and Fred Morley, her husband, parties of the second part, of Lapeer, Michigan,

WITNESSETH:

That Whereas the parties of the second part have loaned to the parties of the first part the full sum of twenty-two thousand five hundred (\$22,500) dollars, which sum the said parties of the first part agree to repay on or before twelve months after this date, and to pay interest thereon at the rate of six (6%) per cent per annum from this date, until paid; and also to pay all taxes and assessments which may be assessed or levied to or against the parties of the second part, or assigns, on account of such loan. All according to the terms of four (4) promissory notes given therefor, of which the following is a copy of the first, to-wit:

Portland, Oregon, April 22nd, 1912.

\$5625.00

On or before three (3) months after date, I promise to pay to the order of Mary E. C. Morley and Fred Morley five thousand six hundred twenty-five dollars, for value received, with interest from date, payable at maturity at the rate of six (6%) per cent per annum, until paid, principal and interest payable in U. S. Gold Coin, at Lumbermens National Bank of Portland, Oregon; and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum of money as the Court may adjudge reasonable as attorney's fees in such suit or action.

R. C. BELL

The other three notes being of the same tenor, date and amount, except that they fall due respectively six (6), nine (9) and twelve (12) months from their date.

Now, therefore, in consideration of the said loan, and for the purpose of securing the payment of the said several sums of money named in said notes, and the faithful performance of all the covenants herein contained, the parties of the first part do hereby grant, bargain, sell and convey unto the said parties of the second part, their heirs and assigns forever, all of that certain real estate situate in Wahkiakum County, State of Washington, and described as follows, to wit:—

- (a) Lots two (2), three (3) and four (4), and the southeast quarter of the northwest quarter, and the east half of the southwest quarter, and the southeast quarter of section nineteen (19); the west half of the southwest quarter of section twenty (20); and the northwest quarter of the northwest quarter of section twenty-nine (29); all in township ten (10) north, range seven (7) west of the Willamette Meridian;
- (b) Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of section twenty four (24); in township ten (10) north, range eight (8) west of the Willamette Meridian, together with the right to remove said timber at any time within twenty (20) years from the eighth day of August, 1906, and together with the right to build, operate and maintain railroads, skidroads, telephone lines, or other devices,

over and across said described land and necessary or convenient to remove said timber therefrom.

- (c) Also that certain right of way conveyed by G. K. Durrah and Clara Durrah, his wife, under date of January 15th, 1912, for fifteen (15) years, in language following, to wit:—

‘A right of way twelve feet wide, over our land for a railroad, commencing about five hundred feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing. We also grant a privilege of using the River Bank as a Roll Way.’

- (d) Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date of January 15th, 1912, for ten (10) years, in language following, to-wit:—

‘A right of way for a railroad over our land, situated near Grays River, Washington. Width of right of way over said ground fifteen feet. Work shall begin within sixty days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a roadbed through the hay field.’

- (e) Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date of January 16th, 1912, for ten (10) years, in language following to wit:—

'A right of way for a logging railroad over the following described land, SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 19, T 10 R. 7. Work to start within sixty days from date. Logging road to follow left hand side along foot hill.'

Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, to have and to hold unto the parties of the second part, their heirs and assigns forever.

But as a mortgage to secure the payment of several sums of money specified in said notes before mentioned, and the performance of the covenants and conditions herein contained.

And the parties of the first part covenant that said R. C. Bell is the owner in fee simple of said real estate.

That it is free from encumbrances, and that they will pay all of said sums of money, the principal and interest, specified in said notes, at the times designated therein, and all the taxes and assessments which may be assessed or levied against the parties of the second part, or assigns, on account of said notes or mortgage and all taxes and assessments which may be lawfully levied upon or against said land when the same become due and payable, and not later than ten days before the same become delinquent.

And it is expressly agreed and provided by and between the parties hereto, that if said mortgagors shall fail or neglect to pay said taxes and assessments as above provided, the mortgagees may pay such taxes and the taxes so paid the parties of the first part agree to

repay, and the said sums of money shall at once become due and bear interest at the rate of six (6%) per cent per annum until repaid. And the same shall be repaid at the same time and with the first installment of interest which shall become due thereafter, and shall be a part of the debt secured by this mortgage and a lien on said land.

It is expressly agreed and provided by and between the parties hereto, that if the mortgagors shall desire to commence to remove any of the timber from the above described lands before the final payment of the said notes secured hereby, then and in that event the mortgagors will, on or before the tenth day of each calendar month, make a report in writing to the mortgagees, which shall be a true and correct statement of all timber cut from said lands during the next preceding calendar month, and shall contemporaneously with said report pay to the mortgagees, to be applied upon the first of said notes thereafter falling due, two dollars and fifty cents (\$2.50) per thousand feet for each and all of said timber cut during the said preceding month, as shown in said reports. If the mortgagees shall become dissatisfied at any time with said reports, they may employ, at the expense of the mortgagors, which said expense shall be secured by this indenture and fall due at the next interest date thereafter upon any one of said mortgage notes, a suitable party to go upon said described lands, or any place where the logs derived from the said timber cut as aforesaid, may be located, for the purpose of scaling, estimating and checking the same, and if it shall appear that said re-

ports, so made by the mortgagors, or any one of them, are not correct, the mortgagees, at their option, may, by notice in writing served upon the mortgagors, prohibit further cutting and removing of any timber from said described lands, and the same shall thereupon cease, until all the balance evidenced by the said notes above described shall have been paid in full.

The mortgagors further agree that they will commence and diligently carry on the construction of a logging road or logging railroad, so that the timber, when cut from the above described lands and ready for market, can be transported therefrom to the said dumping ground on the bank of Grays River, and in said construction they will fully pay all labor and material therefor, and allow no charge or claim to become fastened thereon, which shall be prior or superior to the lien of this mortgage.

It is especially agreed and provided by and between the parties hereto that if the mortgagors shall fail to make any payments hereunder, and in said notes provided, either principal or interest, upon said notes, or for timber cut as hereinbefore provided, whenever the same shall fall due, or shall permit any lien for labor or material for the construction of said logging road or railroad to become a charge or lien upon the said premises above described, or the said timber, or said rights of way, whether the same shall be prior or inferior to the lien of this mortgage, then the whole amount of the principal unpaid, as evidenced by the said notes, together with all interest accrued thereon, shall, at the option of the mortgagees, on demand, become due and payable forthwith.

Now the payment of the said principal, interest and taxes, as above provided, will render this conveyance void.

But it is expressly provided that time and the exact performance of all the conditions hereof is of the essence of this contract, and in case default be made in the payment of any of said sums of money when due and payable, as above provided, either of the principal or any installment of interest, or any portion thereof, or of any of the said taxes, or in the performance of any of the covenants or conditions herein provided on the part of the mortgagors, then the whole of the principal sum and the interest accrued at the time default is made, and all taxes which the holder of said note shall have paid or become liable to pay, shall at the option of such holder become due and payable and this mortgage may be foreclosed at any time thereafter.

And it is also expressly agreed between said parties that if any suit is instituted to effect such foreclosure, by reason of any such default, the party to such suit holding this mortgage may recover therein as attorney's fees such sum as the court may adjudge reasonable, in addition to the costs and disbursements allowed by the code of civil procedure, and said attorney's fees and costs shall be secured by this mortgage.

In witness whereof, the parties of the first part have hereunto set their hands and seals, the day and year first above written.

Signed, sealed, and delivered in the presence

of us as witnesses:—

.....

.....

R. C. BELL (Seal)

MARY A. BELL (Seal)

State of Oregon }
County of Multnomah } ss:

Be it remembered That on this..... day of April, 1912, before me, the undersigned, a Notary Public in and for said county and state, personally appeared the within named R. C. Bell, and Mary A. Bell, his wife, who are known to me to be the identical individuals named and described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same freely and voluntarily.

In witness whereof, I have hereunto set my hand and notarial seal the day and year first in this certificate above written.

Notary Public in and for Oregon.
My Commission expires:—

_____”

VIII.

That the said indenture of mortgage was so executed, witnessed and acknowledged as to be entitled to record, and was thereafter and on the 27th day of July, 1912, duly recorded in the records of mortgages of Wahkiakum county, Washington, in Volume 1, page 88, where at all times since it has remained of record, wholly unsatisfied, except that

all indeptedness therein described has been paid except that sought to be recovered in this suit.

IX.

That there has been a breach in the conditions of said mortgage, not only in the non-payment of the said promissory note at the maturity thereof, both principal and interest, but that the clause of said mortgage reading as follows:—

“It is expressly agreed and provided by and between the parties hereto that if the mortgagors shall desire to commence to remove any of the timber from the above described lands before the final payment of the said notes secured hereby, then and in that event the mortgagors will, on or before the tenth day of each calendar month make a report in writing to the mortgagees, which shall be a true and correct statement of all timber cut from said lands during the next preceding calendar month, and shall contemporaneously with said report pay to the mortgagees, to be applied upon the first of said notes thereafter falling due, two dollars and fifty cents (\$2.50) per thousand feet for each and all of said timber cut during the said preceding month, as shown in said report.”

has not been complied with by the defendants, or either of them; that the defendants have cut and now have on said lands in the Columbia River, and adjacent thereto within said Wahkiakum county, Western District of Washington, Southern Division, more than 1,500,000 feet board measure of the timber cut from said land, cut into saw logs, which is in equity covered by the lien of said mortgage and which the defendants, unless restrained by this

honorable court will remove from the jurisdiction of this court and from the lien of said mortgage, to the great and irreparable damage and injury of the complainants.

X.

That said defendants, mortgagors as aforesaid, have not, on or before the tenth day of any calendar month since commencing the cutting of said timber, made a report in writing, containing a true and correct statement of the timber cut from said lands during the next preceding calendar month, and have not, contemporaneously with said report, or at all, paid to the mortgagees for application upon said note the sum of two dollars and fifty cents (\$2.50) per thousand feet, or any sum, for each and all, or any of said timber cut during said preceding month, but have by extravagant, wasteful and non-lumber-like methods removed from said lands, without said report or payments, the bulk of the merchantable timber thereon, in violation of equity and good conscience, and the provisions of said mortgage thereto relating; that the complainants have made seasonable demands for said reports and said payments, each and all of which the defendants have failed and refused to give or comply with; that the land, and interest therein, described in said mortgage apart from said sawlogs, is not worth the amount of said note, and unless said saw logs are preserved within the jurisdiction and control of this court, to respond to the decree of this court, and the demands of the judgment hereinafter demanded, complainants will be deprived of the benefits of said

mortgage, and of their said lien upon said land, timber and saw logs; that the said million and one half feet, board measure, of timber cut from said lands, as aforesaid, has been cut more than one month prior to the tenth day of June, 1913, and no report or payment therefor, as provided in said contract has been made, although the same has been demanded by the complainants from the defendants; that practically all of the merchantable timber on said land has been prior hereto cut and removed by the defendants from said lands without the payment of said note.

X-1/2

That there has been a further breach in the conditions of said mortgage in the following:—

Said mortgage provides:—

“If the mortgagees shall become dissatisfied at any time with said reports, they may employ, at the expense of the mortgagors, which said expense shall be secured by this indenture and fall due at the next interest date thereafter upon any one of said mortgage notes, a suitable party to go upon said described lands or any place where the logs derived from said timber cut as aforesaid may be located, for the purpose of scaling, estimating and checking the same, and if it shall appear that said reports, so made by the mortgagors, or any one of them, are not correct, the mortgagees, at their option, may, by notice in writing served upon the mortgagors, prohibit further cutting and removing of any timber from said described lands, and the same shall thereupon cease, until all the balance

evidenced by the said note above described shall have been paid in full."

That the complainants (said mortgagees) became dissatisfied with said reports required under the provisions of said mortgage, and sent a suitable party for the purpose of checking up, scaling and estimating the timber cnt, and having ascertained therefrom that the said reports were not correct the complainants (said mortgagees) upon the 11th day of June, 1913, by a notice in writing served upon the defendants (said mortgagors) prohibited them from cutting and removing of any timber from said described lands until all of the balance evidenced by said note above described should have been paid in full; that notwithstanding said notice, the defendants, their servants, agents, employees and representatives, are now about to remove said saw logs, and the whole thereof, from the jurisdiction of this court, as hereinafter more particularly set forth.

XI.

That complainants are informed and believe, and therefore allege to be a fact, that defendants, and neither of them, are financially responsible over and beyond the said mortgaged property, and that they have not property or assets sufficient to meet the demands of the judgment hereinafter claimed herein, except upon the said land, timber, interest in land, and saw logs sought to be foreclosed herein, and that if the said saw logs, or any part thereof, are taken out of the jurisdiction of

this court, the complainants will be wholly remediless in the premises.

XII.

That the defendants, their agents, servants, employees and representatives are now engaged in gathering together and rafting the said saw logs and will as soon as said rafting has been completed, remove the same and the whole thereof from the jurisdiction of this court. That sundry agents, servants and representatives of the defendants are in the physical charge of the said operations, and their names are to the complainants at this time unknown, and it is necessary that they, and each of them, be immediately restrained, as well as the defendants, from removing or attempting to remove said saw logs from the jurisdiction of this court. That it is impossible to give such agents, servants and representatives of the defendants, and the defendants herein, notice of the pendency of this suit prior to the application for a temporary restraining order, and if the defendants, or either of them, or their agents, servants and representatives, had notice of the pendency of this suit, and of the application for a temporary restraining order, they, and each of them, would forthwith proceed to remove said saw logs, and each and every part thereof, from the jurisdiction of this court, to the great and irreparable damages of the complainants.

XIII.

That no suit or action is pending or has been

brought by the complainants for the collection of said indebtedness, or any part thereof, and the amount involved exceeds the sum of three thousand dollars, exclusive of interest and costs.

XIV.

That plaintiffs have no plain, adequate, or speedy remedy at law, but only in equity.

WHEREFORE, complainants pray for a decree against the defendants in manner and form following to wit:—

First:— For an immediate, temporary restraining order, and that upon order to show cause, said temporary restraining order become an injunction during the pendency of this suit, enjoining the defendants, and each of them, their agents, servants, employees and representatives, from selling, conveying, incumbering, or removing from the said county of Wahkiakum, in the said Western Division of Washington, Southern Division, the said saw logs, or any of them.

Second:— For a judgment against the defendant, R. C. Bell, for the sum of five thousand six hundred twenty five dollars (\$5625), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less credit of \$120.93 account of interest thereon paid May 26th, 1913, the further sum of seven hundred fifty dollars, attorney's fees, and their costs and disbursements herein.

Third:—That the defendants, and each of them, be foreclosed of and from all right, title and interest in and to said mortgaged real property described in

said mortgage and the said saw logs and each and every part thereof.

Fourth:— That the said real and personal property be sold as upon execution at law, and that the complainants be empowered to become a purchaser thereof.

Fifth:— That upon final decree the said temporary restraining order be made perpetual.

Sixth:—That from the proceeds of said sale of said mortgaged property and the said saw logs, to which the lien of said mortgage extends, there be paid:—

- (a) The costs of said sale;
- (b) The costs of this suit;
- (c) The said attorney's fees;
- (d) The amount of principal and interest found due the complainants herein.

Seventh:—That if, from the proceeds of said sale, there shall be any overplus, the same shall be paid the defendants.

Eighth:—That, if there be a deficiency arising from said sale, judgment shall be docketed therefor against the defendant R. C. Bell.

Ninth:— That complainants have such other, further and different relief as shall seem proper to a court of equity.

Tenth:— And to the ends aforesaid, may it please your Honors to grant unto the complainants the right of subpoena in chancery according to the uses and practises of this court, directed to the said defendants, and each of them, requiring them, and each of them, to appear in court on a day certain,

therein to be named, and under certain penalty to be therein stated, and then and there to answer (but not under oath, said answer under oath being hereby expressly waived) all and singular the premises and to stand to, perform, and abide by such orders, directions and decree as may be made against them in the premises, and as shall seem meet and agreeable to equity and good conscience, and your complainants, as in duty bound will ever pray.

MARY E. C. MORLEY,

FRED MORLEY,

By PLATT & PLATT & J. O. BAILEY,

Their Solicitors.

PLATT & PLATT, J. O. BAILEY,

Solicitors for Complainants.

ROBERT TREAT PLATT,

Of Counsel.

“Filed U. S. District Court, Western District of Washington, July 7, 1913 By Frank L. Crosby, Clerk, F. M. Harshberger, Deputy.”

UNITED STATES OF AMERICA

*In the District Court of the United States for the
Western District of Washington.*

(In Equity)

THE PRESIDENT OF THE UNITED STATES
OF AMERICA, To R. C. BELL, and MARY
A. BELL,

GREETING:

You Are Hereby Commanded, That you be and appear in said District Court of the United States aforesaid, at the Court Room of said Court, in the city of Tacoma, on the 28th day of July, 1913, to

22 *Mary E. C. Morley and Fred Morley vs.*

answer a Bill of Complaint filed against you in
said Court by

MARY E. C. MORLEY

and

FRED MORLEY

and to do and receive what the Court shall have
considered in that behalf. And this you are not to
omit, under the penalty of Five Thousand Dollars.

WITNESS the Honorable EDWARD E. CUSH-
(Seal) MAN, Judge of said Court, and the seal
thereof, at Tacoma, Washington, this 7th
day of July, 1913.

FRANK L. CROSBY, Clerk.

By E. C. ELLINGTON, Deputy Clerk.

**Memorandum Pursuant to Rule 12, Supreme
Court, U. S.**

YOU ARE HEREBY REQUIRED to enter your
appearance in the above mentioned suit on or be-
fore twenty days after service hereof next at the
Clerk's office of said Court, pursuant to said Bill;
otherwise the said Bill will be taken pro confesso.

(Seal) FRANK L. CROSBY, Clerk.

By E. C. ELLINGTON, Deputy Clerk.

Marshal's Return on Subpoena.

UNITED STATES OF AMERICA,
WESTERN
DISTRICT OF WASHINGTON

SS.

I HEREBY CERTIFY that I have served the
within writ by delivering to and leaving a true copy
thereof with R. C. Bell at Deep River, Wn., and on

Norman Kent, person in possession of mortgaged property, as within I am directed.

JOSEPH R. H. JACOBY,
United States Marshal,
By HARRY A. WHITE,
Deputy.

July 14th, 1913.

Fees: \$15.22.

Answer.

Served on Platt & Platt, 8-18-13.

R. T. PLATT.

To the Honorable Judges of the District Court of the United States, in and for the Western District of Washington, Southern Division:

Come now the defendants above named and for answer to the complaint of plaintiffs herein,

I.

Deny that there has been any breach in the condition of the mortgage set forth and described in the complaint herein in the particulars alleged in Paragraph IX. of Plaintiff's complaint, and deny that the defendants or either of them have failed to perform all and several the terms and conditions of that clause of the mortgage set forth in said Paragraph IX.; and these defendants further deny that at the time of the commencement of the suit, or at any time subsequent thereto, the defendants had or have cut, or had or now have upon said lands in the Columbia River or adjacent thereto, more than One Million and a half feet, board measure, of timber from said land, cut into saw-logs, or that they had on hand of timber from said land, cut into

saw-logs at the time of the commencement of the suit, more than Seven Hundred and Fifty Thousand feet.

II.

As to the allegations of Paragraph X. of plaintiff's complaint, defendants allege that during all of the times referred to in the complaint, and particularly at all times since commencing the cutting of timber on the real property described in the complaint, they have made regular reports in writing, substantially in accordance with the terms of said mortgage, containing true and correct statements of the timber cut from said lands, and these defendants particularly allege that they have given and complied with all demands of the complainants for reports, and that of the sum and amounts secured by the mortgage referred to and described in the complaint, the defendants paid the plaintiff Sixteen Thousand Eight Hundred Seventy-five Dollars (\$16,875), together with accrued interest thereon in advance of the time when such sum would have been due and payable for timber cut from the premises, at Two Dollars and Fifty Cents (\$2.50) per thousand, according to the clause of the mortgage referred to in Paragraph X. of plaintiff's complaint.

III.

Deny that these defendants have removed any timber from said lands by extravagant, wasteful or non-lumber-like methods, in violation of equity or good conscience or otherwise, or in violation of the provisions of the mortgage thereto relating.

IV.

Deny that there is now due from the defendant R. C. Bell to the complainants the sum of Five Thousand Six Hundred and Twenty-five Dollars, with interest, or any sum.

And for a further and separate answer and defense to the complainant's complaint, these defendants allege:—

I.

That the mortgage referred to and described in the complainant's complaint was executed and delivered by these defendants as a part of the purchase price of the real property therein described, the same having been conveyed to these defendants by deed of the complainants to the defendant, R. C. Bell, made, executed and delivered April 22nd, 1912, and recorded July 31st, 1912, in Volume I. of the Record of Deeds of Wahkiakum County, Washington, page 101.

II.

That the total consideration moving to the complainants, on account of the sale of land and timber described in said deed was the sum of \$30,000, of which \$7,500 was paid in cash and the balance in and by the execution and delivery of the promissory notes and mortgage described in the complaint.

III.

That in the negotiations antecedent to the sale by the complainants to the defendant, R. C. Bell, of the land and timber described in the complaint and to the execution of the deed herein above referred to, and the purchase-money mortgage re-

ferred to and described in the complaint, James D. Lacey and Company, factors and brokers of timber land, having offices in the City of Portland, Multnomah County, Oregon, acted as agents and representatives of the complainants, and as a matter of inducement to the purchase by defendant, R. C. Bell, of the land and timber described in the complaint, and to induce said defendant to purchase the same and to execute the note and mortgage described in the complaint, as and for the purchase price thereof, the said James D. Lacey and Company represented to the said defendant, R. C. Bell, that they had carefully and accurately cruised said property, and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good and merchantable timber.

IV.

That the defendant, R. C. Bell, accepted said representation as the representation of the owner of the property and believed the same, and purchased the property and executed the promissory note and mortgage referred to in the complaint as a part of the purchase price thereof, in reliance upon said representations, and would not have purchased said property or executed said promissory note and mortgage as a part of the purchase price thereof if such representations had not been made, and if he had not believed the same.

V.

That thereafter the defendant, R. C. Bell, proceeded to remove timber from the above described

land by careful, workmanlike and lumber-like methods, and has kept accurate and complete record of all merchantable timber cut from said premises, and that the total of such cut and the total amount of merchantable timber on said premises at the time of said sale was less than 8,000,000 feet, to-wit: 7,916,999 feet of merchantable fir, cedar and spruce and of all merchantable timber exclusive of hemlock.

VI.

That the representations of the complainants at the time of the sale of the land and timber described in the complaint made by and through their authorized representatives and agent, James D. Lacey and Company, were false, untrue and fraudulent and that the defendant, R. C. Bell, has been damaged thereby in the sum of \$9,167.57.

And for a second and further answer and defense, these defendants allege:

I.

That there was included in the conveyance by the complainants to the defendant, R. C. Bell, in the deed made and executed by the complainants to said defendant, on the 22nd day of April, 1912, and recorded July 31st, 1912, in Book 1 of the Record of Deeds of Wahkiakum County, Washington, at page 101, the following property:

“Also all of the timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter of Section Twenty-four (24) in Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, together with the right to

remove said timber at any time within twenty (20) years from the 8th day of August, 1906."

II.

That the property described in the last preceding paragraph was also included in the purchase-money mortgage, specifically described and set forth in the complaint herein. That neither at the time of the execution of said deed and purchase-money mortgage nor at any time did the complainants have any right, title or interest in or to the property described in the preceding paragraph nor any right to convey the same, nor did the said conveyance vest in the defendant, R. C. Bell, any right, title or interest in or to said timber.

III.

That the defendant has not been able to cut or remove any of the said timber on account of such failure of title, and defendant is informed and believes and therefore alleges the fact to be that there is timber standing, growing, lying and being on said Southeast quarter of the Southeast quarter of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, to the extent of 1,000,000 feet; and that the defendant, R. C. Bell, has been injured and damaged by failure of the complainants to convey title to said timber in the sum of \$2,500.

WHEREFORE, defendant, R. C. Bell, prays for judgment against the complainants and each of them in the sum of \$9,167.57, as a counter-claim

to plaintiff's right of action and suit on the promissory note and mortgage referred to in the complaint.

KOLLOCK & ZOLLINGER,

Attorneys for Defendants.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, Aug. 20, 1913, Frank L. Crosby, Clerk, by F. M. Harshberger, Deputy."

Amended Reply.

To the Honorable Judges of the District Court of the United States in and for the Western District of Washington, Southern Division:

COME NOW the complainants above named, and with leave of the Court first had and obtained, file this their amended reply to the answer of the defendants filed herein:

I.

Replying to paragraph II. of defendant's answer, on page 2 thereof, complainants deny each and every allegation therein contained and the whole thereof, except that complainants admit the receipt of Sixteen Thousand Eight Hundred and Seventy-five Dollars (\$16,875) together with accrued interest thereon, which complainants allege was received by them in payment of certain promissory notes, secured by the mortgage described in the complaint, other than the promissory note set out in paragraph IV. of the complaint filed herein.

II.

Replying to paragraph I. of defendant's first further and separate answer and defense, on page 3 of said answer, complainants admit that the real

property described in the mortgage set out in the complaint was conveyed to the defendant, R. C. Bell, by deed of the complainants to the defendant, R. C. Bell, made, executed and delivered on the 22nd day of April, 1912, and recorded the 31st day of July, 1912, in Volume I., on page 101, Records of Deeds of Wahkiakum County, Washington, but deny each and every other allegation contained in said paragraph I., and the whole thereof.

III.

Replying to paragraph II. of defendant's first further and separate answer and defense, on page 3 of said answer, complainants admit that the total consideration moving to complainants on account of the sale of the land and the timber described in the deed of these complainants to defendant, R. C. Bell, executed the 22nd day of April, 1912, and recorded the 31st day of July, 1912, in Volume I. on page 101, Records of Deeds of Wahkiakum County, Washington, was Thirty Thousand Dollars (\$30,000), of which amount the sum of Seven Thousand Five Hundred Dollars (\$7,500) was paid in cash at the time of the conveyance of said property, but deny each and every allegation contained in said paragraph II. and the whole thereof.

IV.

Replying to paragraph III. of defendant's first further and separate answer and defense, on page 3 of said answer, complainants admit that in the negotiations antecedent to the sale by complainants to the defendant, R. C. Bell, of the land and timber described in the complaint and to the execution

of the deed for said land and timber and the mortgage referred to and described in the complaint, James D. Lacey & Company, factors and brokers of timber land, having offices in the City of Portland, Multnomah County, Oregon, acted as brokers of complainants; and admit that the estimate made by said James D. Lacey & Company of the amount of timber on said land, as shown by the cruise of said land made by said company and its agents, was, exclusive of hemlock, eleven million five hundred eighty-four thousand (11,584,000) feet, board measure, of good and merchantable timber; but deny each and every other allegation contained in said paragraph III. and the whole thereof.

V.

Replying to paragraph IV. of said further and separate answer and defense, on page 4 of said answer, complainants admit that defendant purchased the property and executed the promissory note and mortgage referred to in the complaint, but deny each and every other allegation contained in said paragraph, and the whole thereof.

VI.

Replying to paragraphs V. and VI. of said first further and separate answer and defense, on page 4 of said answer, complainants deny each and every allegation contained in said paragraphs, and the whole thereof.

VII.

Replying to paragraph I. of defendant's second further and separate answer and defense, on pages

4 and 5 of said answer, complainants admit the allegations therein contained.

VIII.

Replying to paragraph II. of said second further and separate answer and defense, on page 5 of said answer, complainants admit that the timber described in paragraph I. of said second further answer and defense was included in the mortgage specifically described and set forth in the complaint herein, but deny each and every other allegation contained in said paragraph II., and the whole thereof.

IX.

Replying to paragraph III. of defendant's second further and separate answer and defense, on page 5 of said answer, complainants deny each and every allegation therein contained, and the whole thereof; and complainants allege that the amount of timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter (SE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, is approximately three hundred and thirty-two thousand (332,000) feet, exclusive of hemlock.

And for a further and separate reply to the second and further answer and defense set forth in the answer of defendants filed in the above entitled cause, complainants allege:

I.

That the defendant should not be admitted to allege and should not be stopped from alleging that

neither at the time of the execution of the deed and mortgage between the complainants and defendant, R. C. Bell, nor at any time, did the timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Twenty-four (24), in Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906, or any right to convey the same, or that the conveyance of the same did not vest in the defendant, R. C. Bell, any right, title, or interest in or to said timber, or that the defendants have not been able to cut or remove any of the said timber on account of such alleged failure of title, or that there is now standing, growing, lying and being on the Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, timber to the extent of one million (1,000,000) feet, or any number of feet, or that the defendant, R. C. Bell, has been injured and damaged by failure of the complainants to convey title to said timber in the sum of Two Thousand Five Hundred Dollars (\$2,500) or any sum, for the reason:

II.

That prior to the consummation of the sale and purchase by and between the complainants and defendants of the said timber on the said Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Twenty-four (24), Township Ten (10)

North, Range Eight (8) West of the Willamette Meridian, in Wahkiakum County, State of Washington, with the right to remove the same within twenty years from August 8, 1906, and prior to the delivery to the defendants of the deed conveying said timber so described, to the defendants in the above entitled suit, and prior to the execution and delivery of the notes and mortgage covering amongst other properties, the timber so described, from the defendants to the complainants, more particularly set forth and described in paragraphs IV. and VII. of the bill of complaint filed in the above entitled suit, the defendants knew and were advised of the fact that through inadvertence and mistake, one of the complainant's predecessors in interest to the said timber herein described had recorded his deed in a record book known as "Miscellaneous Records" instead of the record book called the "Record of Deeds," and were advised of the fact that the legal title to said described timber was vested in the complainants, regardless of the fact that said deed had been inadvertently and mistakenly recorded as aforesaid, and having full knowledge of the existence of such facts and having consulted an attorney at law concerning the legal effect of such facts, and acting with full knowledge of the existence of such facts, said defendants agreed to purchase said described timber from the complainants, upon condition as agreed between the parties, that Harrison G. Platt and Robert Treat Platt furnish the defendant, R. C. Bell, with a memorandum of agree-

ment indemnifying said defendants against any damage which they might suffer by reason of the fact that said deed had been inadvertently and mistakenly recorded, and in pursuance of such arrangement an agreement was made and entered into by and between Harrison G. Platt and Robert Treat Platt, parties of the first part, and R. C. Bell, party of the second part, wherein and whereby it was agreed that the parties of the first part should either procure for the party of the second part a deed or deeds sufficient to convey to the said R. C. Bell the said described timber and rights appurtenant thereto, or else protect and save harmless the said defendant R. C. Bell against any damages, charges, or expenses which the said R. C. Bell might incur or suffer by reason of cutting or removing said timber, which said agreement was made and entered into on the 12th day of July, 1912, and was accepted by the defendants contemporaneously with the execution and delivery of the deed referred to in paragraph I, Page 4, of defendants' answer filed in the above entitled suit, being the deed of conveyance from the complainants to the defendants conveying the timber herein described, and which memorandum of agreement was accepted and acted upon by the complainants and the defendants as constituting, together with said deed and the notes and mortgages referred to in paragraphs IV. and VII. of complainants' complaint filed in the above entitled suit, the contract of conveyance of said described timber, and said agreement of indemnity was accepted by the defendants in lieu of any

covenant or agreement upon the part of the complainants as to their right to convey title to said timber so described, and all parties to said transaction, including defendants above named, acted in accordance with the provisions of said agreement of indemnity and have continued to so act since the date of the consummation of the sale and purchase of said described timber between said complainants and said defendants, and defendants have never asserted or attempted to assert, or claimed or attempted to claim, that they did not have knowledge at the time of the execution and delivery of the said deed and agreement of indemnity referred to, of the fact that one of the complainants' predecessors in interest had inadvertently and by mistake recorded his deed of conveyance in the record known as "Miscellaneous Records," and have never claimed or attempted to claim any injury or damage on account of said inadvertence and mistake in so recording said deed, other than as alleged in their purported second and further answer and defense to the bill of complaint of the complainants filed in the above entitled suit, and said defendants have never claimed or attempted to claim, and have never notified or attempted to notify the complainants or the parties of the first part to said agreement of indemnity, or either of them, or anyone acting on their behalf or on behalf of any one of them, that any person or persons whomsoever, had asserted or attempted to assert any right or claim against the title of the complainants to the said timber so described,

on account of the fact that one of the predecessors in interest of the complainants had inadvertently and mistakenly recorded his deed in the record book known as "Miscellaneous Records," or that any person or persons had asserted any claim or right against the title of the complainants to the said described timber upon any other ground, and the said Harrison G. Platt and Robert Treat Platt, parties of the first part in said agreement of indemnity, have, in pursuance of the terms of said agreement, procured a deed sufficient to convey to the said R. C. Bell the timber and rights on said Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, and now hold said deed, and it was stipulated and agreed by the said defendant, R. C. Bell, in said agreement of indemnity, that there was included on the Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, not more than three hundred thirty-two thousand (332,000) feet of timber, and the defendants accepted the said deed to the timber so described, together with said agreement of indemnity, with full knowledge of the fact that said agreement of indemnity recited that there was included in said purchase of the timber standing, growing, lying and being on the said Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Twenty-four (24), Township Ten (10)

North, Range Eight (8) West of the Willamette Meridian, three hundred thirty-two thousand (332,000) feet of timber, and said defendants have never claimed or attempted to claim that there was contemplated by said purchase any more than three hundred thirty-two thousand (332,000) feet of timber, other than as by the allegation of their answer set forth in paragraph III., page 5, of said answer, it is alleged that there is now standing, growing, lying and being on said Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section Twenty-four (24), Township Ten (10) North, Range Eight (8) West of the Willamette Meridian, timber to the extent of one million (1,000,000) feet, which, it is alleged, the defendants have been unable to cut on account of said alleged defect of title, owing to the fact that one of the complainants' predecessors in interest had by inadvertence and mistake so recorded his deed in said "Miscellaneous Records."

WHEREFORE, complainants pray relief as set forth in their original bill of complaint.

PLATT & PLATT,
Solicitors for Complainants.

HUGH MONTGOMERY,
Of Counsel.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, June 15, 1914. Frank L. Crosby, Clerk—By F. M. Harshberger, Deputy."

Statement of Evidence.

BE IT REMEMBERED, That heretofore and upon, to-wit, the 15th day of June, A. D. 1914,

the above entitled cause came on duly and regularly for hearing before HON. E. E. CUSHMAN, Judge of the above entitled Court, at the hour of 2:00 P. M., in the City of Tacoma, Washington,

The Complainants herein being represented by their solicitor of record, HUGH MONTGOMERY, Esq., of PLATT & PLATT, and

The Defendants herein being represented by their solicitor of record, J. K. KOLLOCK, of KOLLOCK & ZOLLINGER:

AND THEREUPON, the following proceedings were had and done, to-wit:

The solicitors for the complainants and defendants made their opening statements to the Court, and thereupon the complainants introduced the following evidence in support of their case:

Complainants' Evidence.

A stipulation between the complainants and the defendants was admitted in evidence without objection and marked "Complainants' Exhibit No. 1," which said stipulation, omitting the title of the court and cause, is in words and figures as follows:

"WHEREAS, this is a suit to foreclose a mortgage upon real estate and interest in real estate, as described in the complaint, and upon saw logs cut from timber on said real estate and interest therein; and

WHEREAS, heretofore and on the 7th day of July, 1913, the Honorable Judge of the above entitled court made and entered an order requiring the defendants, and each of them, to show cause on the 14th day of July,

1913, at the hour of 10:00 o'clock in the forenoon, why an injunction order should not be issued, herein; enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wahkiakum, in said district and division, one and a half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling, conveying, encumbering or removing from the said County of Wahkiakum, the said saw logs, or any part thereof,

NOW, THEREFORE, IT IS HEREBY STIPULATED by and between the complainants above named, acting by Messrs. Platt & Platt and J. O. Bailey, their solicitors of record, and defendants, acting by Messrs. Kollock & Zollinger, their solicitors of record, that upon the execution and filing in the above entitled court of a bond in the sum of seventy-five hundred (\$7,500) dollars, signed by the defendant R. C. Bell, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the surety laws of the State of Washington and of the United States, authorized to act as surety in the State of Washington, as surety, conditioned that in consideration of the release of said saw logs from the inhibi-

tion of said temporary restraining order, the said principal and surety will abide by and pay or comply with any judgment or decree that may be rendered in the above entitled suit in favor of the complainants and against the defendants, and that judgment and decree may be rendered likewise against said American Surety Company of New York as well as against the defendants, if the above entitled court shall resolve the issues in said cause in favor of the complainants and against the defendants, and that in such case, and such case only, an order may be entered herein releasing from temporary restraining order the said saw logs.

It is the purpose and intent of this stipulation that the said bond shall stand in the place and stead of said mortgaged property released, and that the above entitled court shall have jurisdiction in any decree that may be rendered in favor of the complainants and against the defendants to include in said decree a judgment against the principal and surety on said bond without the necessity of the complainants herein bringing action upon said bond in another proceeding.

Nothing herein shall be construed as inhibiting any of the parties hereto from appealing from any decree rendered by the above entitled court, to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and during the pendency of such an appeal and until the conclusion thereof, said bond shall continue in full force and effect, and the same judgment and decree may be rendered against said principal and said surety in said appel-

late court, or upon any retrial of said cause in the above entitled court, in case said appellate court or this court shall decide the issues in this cause in favor of complainants and against defendants.

PLATT & PLATT AND J. O. BAILEY,
Solicitors for complainants.

KOLLOCK & ZOLLINGER,
Solicitors for defendants."

Thereupon there was admitted in evidence a bond executed by R. C. Bell and the American Surety Company, dated July 12, 1913, which said exhibit was marked "Complainants' Exhibit No. 2," and is in words and figures, omitting the title of the court and cause and signatures, as follows:

"WHEREAS, R. C. Bell and Mary A. Bell, on the 22nd day of April, 1912, executed and delivered to Mary E. C. Morley and Fred Morley, her husband, their mortgage upon certain land and standing timber and interest in land in the County of Wahkiakum, State of Washington, which said mortgage was so executed and acknowledged as to be entitled to record, and was recorded on the 27th day of July, 1912, in the records of mortgages of Wahkiakum County, State of Washington, in volume 1, page 88, where at all times since it has remained of record and unsatisfied as to the indebtedness hereinafter referred to, and

WHEREAS, said mortgagees have filed in the United States District Court for the Western District of Washington, Southern Division, a suit to foreclose said mortgage against the property therein described and certain

timber cut therefrom and within the jurisdiction of said court, and

WHEREAS, heretofore and on the 7th day of July, 1913, the Honorable Judge of the above entitled court made and entered an order requiring the defendants, and each of them, to show cause on the 14th day of July, 1913, at the hour of 10:00 o'clock in the forenoon, why an injunction order should not be issued therein, enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wahkiakum, in said district and division, one and a half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling, conveying, encumbering or removing from the said County of Wahkiakum, the said saw logs, or any part thereof,

NOW, THEREFORE, R. C. Bell, one of the said defendants, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the laws of the United States and the State of Washington authorized to engage in the surety business in the State of Washington, as surety, are held and firmly bound unto Mary E. C. Morley and Fred Morley, in the sum of seventy five hundred dollars (\$7500).

The condition of this obligation is such that

WHEREAS, in consideration hereof a stipulation has been entered into by and between the said mortgagees, the complainants in said suit, and said mortgagors, the defendants in said suit, acting by their respective solicitors of record, wherein and whereby in consideration of the modification of said temporary restraining order and an order of court thereon relieving said saw logs from the inhibition of said temporary restraining order, and the turning over of said saw logs to the defendants, the principal and surety herein agree to and with the complainants herein that in the event that a judgment and decree is entered in said suit in favor of the complainants and against the defendants, the said judgment shall be likewise rendered against the surety herein, as though it had been a party defendant to such suit and to the obligations sought to be enforced therein, it being the intent and purpose of this bond that the liability of said surety shall take the place of and be in lieu of said mortgaged property released from the inhibition of said temporary restraining order.

The liability of the principal and surety hereunder shall continue until and including final judgment and decree in the said suit and satisfaction thereof.

Nothing herein shall be construed as prohibiting either party to such suit from appealing the same to the United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, the principal above named has hereunto set his hand and seal, and the said surety has hereunto set its

corporate name and seal by its proper officers thereunto duly authorized this 12th day of July, 1913."

The foregoing together with the admission in the pleadings being the complainants' case in chief, the defendants, to maintain the affirmative matter set up in their answer, introduced the following evidence, to-wit:

R. C. BELL, one of the defendants herein, was called and sworn as a witness on behalf of the defendants, and in answer to interrogatories propounded to him by Mr. Kollock of attorneys for the defendants, testified as follows:

"My name is R. C. Bell. I reside in Portland, Oregon, and am engaged in the logging business and have been engaged in said business in Portland about twelve years. Through the agency of Lacey & Company I had business dealings with Mary E. C. Morley and Fred Morley in reference to the purchase of certain timber from them, in the year 1911."

Q. Will you state how this particular tract of timber was first called to your attention, Mr. Bell?

MR. MONTGOMERY: Now, if the court please, I assume that the evidence now being offered is being offered in connection with the first purported defense, and I desire at this time to interpose an objection to this testimony as being incompetent, irrelevant and immaterial, upon the ground and for the reason that the facts stated in said purported defense and answer are insufficient in law to constitute a defense in a suit of this kind. The specific allegations set forth

in the answer are that the complainants, acting through the James D. Lacey Company, represented to the defendant, R. C. Bell, that they had carefully and accurately cruised said property, and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good, merchantable timber, and the position of the complainants is that an allegation of that kind, and the words set forth in the answer, are insufficient to constitute a basis for fraudulent representation. The allegation, as Your Honor will note, is not that we represented unqualifiedly that there was on this ground 11,584,000 feet of timber, but that we had cruised this property, and that the cruise was 11,584,000 feet of timber. Now, our position is that the only evidence admissible under a pleading of this kind would be that, in truth and in fact, we had handed him one cruise and substituted another, or that our cruisers had gone upon the ground and made one cruise, which showed a certain number of feet, and that we had represented to him a different cruise. That is literally what we are charged with by this answer, that we had openly made fraudulent representations as to the amount, and for those reasons, and in view of the nature of the inquiry propounded, I conclude that they are relying upon general representations, and I desire to interpose an objection at this time.

THE COURT: I will rule upon the whole matter after the testimony is in. The objection will be overruled at this time.

Exception allowed.

A. It was along in the latter part of October,

1911, that I received this letter from the Lacey people that they had a desirable tract of timber, and this is the letter that brought us together.

MR. KOLLOCK: I will offer in evidence said letter from the James D. Lacey & Company, under date of October 21, 1911, addressed to the Campbell Logging Company, Deep River, Washington.

MR. MONTGOMERY: I desire the record to show a continuing objection to all of this line of testimony, and particularly as to this letter, as being incompetent, irrelevant and immaterial, and for the reasons more particularly set forth in the objection to the other question.

THE COURT: Objection overruled; it will be so understood.

Exception allowed.

Thereupon said letter was admitted in evidence and marked "Defendants' Exhibit A."

"The Campbell Logging Company of Deep River, Washington, is a logging company composed mostly of myself. Subsequently to this letter I took this matter up with James D. Lacey & Company and called on the Lacey people and met Mr. Langille, the author of the letter marked 'Defendants' Exhibit A.' I told Mr. Langille that I was looking for a show like that, and I would like to have him go farther into it and explain what there was in there, and he gave me some figures, and I drew a map from the piece of paper that Mr. Langille gave me at that time, stating how many feet and the different kinds of timber that there was on

there. This paper is the identical map and estimate prepared by me at the time of this conversation with Mr. Langille and in his presence."

Thereupon said paper was introduced in evidence over the continuing objections of complainants and marked "Defendants' Exhibit B."

"'9480 Y. F., 300 C., 1804 Spr., 3077 Hem., 14661 total,' in the upper lefthand corner of Defendants' Exhibit 'B' are in my hand writing, and were placed upon that paper by dictation of Mr. Langille. I placed them there as he read them off from some data that he had. The total represents million feet board measure. That would be fourteen million, two hundred and some odd thousand. That would be nine million, four hundred and eighty thousand feet of yellow fir, three hundred thousand cedar, one million, eight hundred and four thousand spruce, and three million, seventy-seven thousand hemlock.

"During said conversation with Mr. Langille and after adding the stuff up, and seeing the different varieties, I told Mr. Langille I was not looking for hemlock; that I could not use it, but that the cruise on the spruce, fir and cedar, which made about 11,584,000, would be attractive, if there was that much there. He wanted thirty thousand dollars for that property, and I said, 'Mr. Langille, I would not give you thirty thousand dollars for 11,584,000 feet of timber, because that is too much, but the general run of timber is that it should exceed the estimate. Now, I presume this is a fair—a careful estimate of that, with a fair over-run. If you tell me that it will run 12,000,000 feet, I will give you thirty thousand dollars; I will give you two dollars and a half per thousand and will throw out the hemlock.' He said, 'I be-

lieve it will run twelve million feet; it has been cruised conservatively.' That is all.

"I did not have any knowledge of the standing of James D. Lacey & Company as timber cruisers in Portland and vicinity at this time, except from general repute, which was to the effect that they were careful cruisers and could be relied upon. I knew that this timber was large, overgrown yellow fir, which was the bulk of the product. The only discussion which I had with Mr. Langille at that time about the character of the timber was regarding the yellow fir, and he simply represented it to be yellow fir. I had not paid to exceed two dollars and a half before this for timber of that character and in that vicinity. The last I had bought from Weyerhaeuser was a price of \$2.80, and that is why I assumed I could pay on that market two dollars and a half a thousand. I had not paid any in excess of that at that time. My experience in purchasing from Weyerhaeuser had been that I had invariably had an over-run always in excess of what I had figured on at the purchase price. I never cruised after them. The estimates made and furnished by the Weyerhaeuser Company are no doubt made for selling purposes, because they generally buy their timber by the acre and get it as cheap as they can, and then they have a very careful estimate of what is on it in order to get the price. It was first called to my attention in the fall of 1912 that there would be a material variation in the cut from the estimate upon which I purchased the property. My foreman, having the data as to the amount there, told me it was not going to come out, and, therefore, I had them make a survey of what was left, and found it was from—found that it was going to run a lot short,

and I wrote to the Lacey people of the fact, and stated that we had better get together and adjust the matter; that it was going to fall away short. At that time I did not have any experting done on the cut and output from the timber. We had a complete record of all of the output from day to day and the final disposition of it to the mill. At the time I called the complainants' attention to the shortage I gave them a complete record of the amount of logs we had logged and the probable amount that was left. That was in the fall, as I recall it, of 1912, and might have been October or November. I got a reply shortly afterwards which would indicate the time. This letter, dated May 1st, 1913, addressed to me and signed by James D. Lacey & Company by Langille, is the reply to which I refer. I must have been mistaken as to the date being in the fall. As shown by this letter it was probably some time in the spring of 1913, possibly in April of that year. I am not confident that the letter with the mention of the shortage went to him just at that time, or when, but that is the result of the letter. The complete statement of the output of the tract, as shown by the log scale and the Scaling Bureau's scale—the computations of the total output for this statement to James D. Lacey & Company—was made by H. V. Carrington, our public accountant. This letter of May 1, 1913, is a letter which I received in response to our estimate for reduction of the balance due on the note."

Said letter was introduced in evidence over the continuing objections of complainants, and marked "Defendants' Exhibit C."

"Mr. Carrington has the actual amount of timber, merchantable fir, removed from this tract

from the time we commenced logging it until it was finally denuded of all timber. I have recently had an independent cruise made of the condition of the timber on the land covered by the pleadings in this case. I ordered the cruise to be made by the firm of Brown & Brown. This firm are timber cruisers located in Portland, Oregon. I received a report from them, and this is the report received by me from Brown & Brown as to the condition of this timber."

Q. Now, reverting to the time of the closing of the original deal for the purchase of this tract, I will renew the question I started to ask you a little while ago, and ask you whether, in the closing of that transaction, your attention was specifically called to the condition of the title to a certain tract, consisting of forty acres described as the southeast of the southeast of section 24?

MR. MONTGOMERY: Now, if the court please, I would like to have the record show a motion on behalf of the complainants in this action to strike from the record all of the testimony offered upon the question of alleged fraudulent representations upon the ground and for the reason that the same is incompetent, irrelevant and immaterial, under and in accordance with the answer—with the allegations in the answer filed in this case, for the reason that the claim of the defendants, as shown by said answer, is that the complainants represented they had made a cruise, and that said cruise showed a certain number of feet, and it is not alleged that any representations as to the exact amount of timber, independent of the

cruise, were made by the defendants, and upon the further ground that it appears from the testimony of the witness that the statements of Mr. Langille, of the James D. Lacey Company, alleged to have been made on behalf of the complainants in this case, were matters of a belief and an opinion, and not statements of fact.

(Argument of counsel).

THE COURT: The motion will be denied at this time, with the intention of ruling on this matter all together when all of the evidence is in.

Exception allowed.

(Last question read by the reporter.)

MR. MONTGOMERY: Now, if the court please, as to the question, I desire to interpose an objection upon the ground and for the reason that, as shown by the admitted allegations of the pleadings in this case, the entire real property involved was finally and subsequently transferred by a deed of conveyance, and that in cases of the selling of real property there is no implied warranty of title, and that in sales of real property the parties are held entirely to the covenants in their deeds, and upon the further ground that the deed of conveyance is the best and primary evidence of what the parties agreed upon as to the question of title, and that any prior negotiations, antedating the sale of the property, were merged in the deed of conveyance.

Objection overruled. Exception allowed.

Q. By whom was your attention called to the title of that particular forty-acre tract?

MR. MONTGOMERY: I would like to amplify the prior objection, upon the further ground that

upon the allegations of the defense pleaded in this case, there is no allegation of any breach of covenant, and a mere naked statement that the complainants in this case failed to convey a good title.

(Argument of counsel).

THE COURT: Objection overruled for the present. I will rule finally on that along with the other matters when the evidence is all in. Exception allowed.

(Last question read by the reporter.)

A. My attorney, Mr. Kollock.

“At the time negotiations were taken up, no evidence of title was submitted to me personally by or furnished me by the complainants here or their representatives, James D. Lacey & Company. No abstract was submitted to me. They gave me an abstract of title with the proposed contract of sale. This is the abstract which was delivered to me at the time of the sale, I think by Mr. Langille. I do not know. It came with the contract. I believe it was delivered to me at the time of the delivery of the contract. This paper is the contract for the purchase of the property.”

MR. KOLLOCK: I will offer in evidence this contract, May 24, 1911, not for the purpose of establishing any rights, but for the purpose of proving an admission by complainants as to the condition of title—in connection with the testimony of this witness.

MR. MONTGOMERY: I object to the introduction in evidence of this document upon the ground and for the reason, as shown by the pleadings in this case, that all prior negotiations

were merged under the principles of law in the subsequent deal.

Objection overruled. Exception allowed.

MR. KOLLOCK: I will now offer in evidence as a part of testimony of this witness, abstract of title, certified by the Wahkiakum County Abstract Company, Cathlamet, Washington, covering the Southeast quarter of the southeast quarter of section 24, township 10, north range 8 west, and specifically offer in evidence that portion of the abstract which refer to that particular forty-acre tract, and especially the instrument appearing at page 4 of said abstract, being a contract between Christopher William Whitford and Elmira Whitford, his wife, to one Ernest Strom, dated August —, 1906, and indicated by said abstract to have been recorded August 14, 1906 in Book A, Miscellaneous Records, pages 223 and 224 thereof, and the subsequent conveyances,— the subsequent entries in said abstract, showing subsequent conveyances by Christopher William Whitford and Elmira Whitford, his wife, of the real property described in said contract and by their successors, and ask leave to substitute copies of such portions of the abstract as are now offered in evidence.

MR. MONTGOMERY: I desire the record to show a continuing objection to this particular piece of evidence, being the abstract in question, and also the further and more particular objection that the abstract and the deeds shown therein are mere copies and not the best evidence and not certified copies of the records as required by law.

THE COURT: Objection overruled. The objection would be good if it had not been shown that the

abstract was furnished by the complainants' agent.

MR. MONTGOMERY: I understand, if the court please, that the abstract was not offered in its entirety.

MR. KOLLOCK: It was offered in its entirety, but particularly in reference to these deeds, in order to save the trouble of copying; that was all.

Said abstract was thereupon admitted in evidence and marked "Defendants' Exhibit F."

"I do not recall whether or not any subsequent agreement was delivered to me in reference to the title to this particular forty-acre tract. I believe that I was notified by my attorneys or agents that an agreement had been accepted by them with reference to the title to said land. I believe that this paper was delivered to me about the time it bears date, to-wit, July 12, 1912, by John K. Kollock, my attorney, as having been received by him from Platt & Platt, attorneys for the complainants in this case."

Thereupon said paper was offered and admitted in evidence without objection, and marked "Defendants' Exhibit G."

"Up to this time no notice, written, formal or otherwise, has been served upon me at any time that the complainants in this case, or their attorneys, Platt & Platt, the signers of the agreement introduced in evidence, marked 'Defendants' Exhibit G,' had procured title to the property in question and were ready to or had conveyed it to me. I took advice of counsel as to my rights in going upon the property in question and removing the timber at the time during my cutting of the timber on the rest of the property included in this pur-

chase. I asked if it would be safe in taking it under that agreement and possibly other people owning the stuff, and I was advised that I really would not be safe. The reason was given in this way; that if they did not own it and other people did, and I took it, I would surely be stealing it and under the law they would recover three times its value, so I passed it up and went by. We were past there by October of 1912. We could not take it after that. I mean that we could not have taken it after that because it did not represent very much timber and we have to go to a great deal of expense to get timber, and not having taken it at that time we could not take it profitably by taking it now, because we could not reach it. Mr. Langille did not tell me what there was on that particular forty acres. I requested them to submit a cruise, to submit some figures as a cruise for the Lacey people of the stuff that was on this forty-acre tract at the time this agreement was made. This agreement specifies 332,000 feet of timber on said tract, and I understood that those figures were furnished by Mr. Langille as his cruise for the property, and I accepted it as such. Yes, I was willing to accept that as a basis. I had taken his other figures and I had no reason to doubt it. The purchase price was based upon the maximum figures discussed between me and Mr. Langille, which was two and a half per thousand. The statement in said agreement (Defendants' Exhibit 'G') of two dollars per thousand feet is not correct. That is an error. The actual price at which I purchased the timber is as it stands now. It would be—we cut about eight and a half million out of the twelve million; it is two and a half million short. That would bring the price up between three and a half and three

seventy-five per thousand. I believe that an independant cruise of this timber of the forty-acre tract was included in the Brown & Brown cruise. I do not know exactly the figures as furnished by Lacey & Company to me, but it was somewhere in the two hundreds. By refreshing my memory from this paper I am able to state that the amount was two hundred sixty-six thousand. This is a deed of the property."

Thereupon said deed was offered and admitted in evidence without objection, and marked "Defendants' Exhibit H."

This being all of the direct examination of Mr. Bell, the following motion was made by Mr. Montgomery of counsel for complainants, to-wit:

Now, I desire at this time to have the record show a motion to strike all of the testimony of the witness as to the question of the alleged defect in the title involved in this case, upon the ground and for the reason that there are no facts pleaded in the answer sufficient to constitute a defense upon this question, and for the further reason that there is pleaded no alleged breach of covenant, neither expressed nor implied, and upon the further ground that nothing has been offered in evidence to show that in the deed from the complainants to the defendants there was any express covenant of seizin or of title, and that in actions and dealings concerning transfers of real property the parties are bound to rely upon covenants contained in the deeds. THE COURT: The same ruling. Exception allowed.

Upon CROSS-EXAMINATION by Mr. Montgomery of counsel for the complainants, the witness, Mr. Bell, testified as follows:

“Prior to buying this so-called Grays River tract, I had done considerable logging down in that vicinity and all around there. I had not been on this Grays River tract, but I had seen it. Up to the time of our first negotiations I had never been near it. I had logged about ten miles from it as the crow flies, I guess. This letter which was introduced by the defendants, reciting that there was fourteen million feet of timber, referred to fourteen million including the hemlock. I presume the first time that I said to the Lacey Company that there was a shortage was in the spring of 1913, although I thought I had notified them in the fall of 1912. That was not about the time that they were beginning to press me for payment. I did not know that that note was due at that time. Yes, it was dated August and there were other notes, but all the other notes had been paid. I do not think that at the time of my complaint that that note was due. I used donkey engines in my work down there. In operating that tract I think we operated at times three donkey engines, most of the time two. I left some good lumber behind. I found by the cruise of Brown & Brown that we had left something like one million two hundred thousand feet, but it was inaccessible and we left it there. I mean by inaccessible that we could not reach it. Anything that was left we could not reach. No, that was not the fault of the cruise, not as to that 1,200,000 feet. We should have gotten that. The only timber which we left down there, outside of this forty acres, is about 1,200,000 feet that could not be brought in and it is there yet. We located there about the Fourth of July and started right after the Fourth of July logging in 1912, and we were through log-

ging there about the following April, about nine months."

On RE-DIRECT examination the witness testified as follows:

"I testified in response to a question asked by counsel for the complainant that I learned there was one million two hundred thousand feet of timber which might have been taken but is still remaining on the tract. I learned this from the report of Brown & Brown, to which I was referring, which is marked 'Defendants' Exhibit D,' for identification."

H. V. CARRINGTON was called and sworn as a witness on behalf of the defendants, and in answer to interrogatories propounded to him by Mr. Kollock of attorneys for the defendants, testified as follows:

"My name is H. V. Carrington and I reside at Portland, Oregon. My business is public accountant. For my information and for Mr. Bell's information, in accordance with instructions from Mr. Bell, I made a statement of the total output from the property in question, both as to log scale and by the Columbia River Scaling Bureau scale. I started my record with the cruisings given to me by Mr. Bell as coming from the Lacey Company. I received in our office weekly an exact transcript of the train scale, which is a summary of each log as it comes from the train, as it goes into the slough. I compiled those by months. When the rafts are charged in accordance with the Columbia River Scaling Bureau scales, I took the rafts as shown by that scale by months and called that the scales as compared with the cut. This is a summary prepared by me from the original

records. The Columbia River loggers as a rule are the men employed by the Bureau for their scaling. I will say in connection with these figures that not all of the rafts were scaled by the Bureau. Occasionally it was more convenient for us to have them scaled by the mill, but most of them were scaled by the Bureau. In either case, in connection with our men, the scale was either by a Bureau of log scalers, independent altogether of defendants in this case, or any of its companies, or by the purchaser to whom we were selling the logs."

MR. KOLLOCK: I will offer this in evidence.

MR. MONTGOMERY: I would like to ask a few questions:

Q. Have you any knowledge, outside of the books, of the exact output of that timber down there? You were not on the ground, were you?

A. I was not on the ground; no, sir.

MR. MONTGOMERY: If the court please, I would like to interpose an objection to this evidence on the ground that the same is incompetent, irrelevant and immaterial, and not the best evidence of the facts sought to be proved. In connection with that objection, I desire to state that I am fully aware that we are in a court of equity, and that the rules of evidence are liberal, and perhaps more so than in a court of law, but the complainants here are being charged with fraud, fraud as to the amount of timber which it is claimed they represented. Now there is an attempt to show that amount of timber did not materialize by certain copies of records which this witness received from somebody else, without any effort to procure a single man upon the

ground or who made the scale, or who sawed the logs, or cut the timber, regardless of the fact that their depositions can be taken, no matter where they are located in the United States, and yet they come in here with such character of evidence as this and seek to prove fraud as against us. It seems to me that they should be held strictly to the character of evidence that we have produced and not from secondary evidence of this kind.

THE COURT: Do I understand this compilation is made from the books of the company for which you were bookkeeper?

MR. KOLLOCK: I will ask the witness to show the court these various papers I am now handing him.

MR. MONTGOMERY: I have no objection to these particular documents not being the original books. My objection goes to the evidence as not being the best evidence.

MR. KOLLOCK: That it is not the best evidence is good, because it is a copy?

MR. MONTGOMERY: That the books themselves, or anything taken from them, is not the best evidence of the facts sought to be proved.

Objection overruled. Exception allowed.

Thereupon said papers were admitted in evidence and marked "Defendants' Exhibit I."

"I have not figured the exact percentage variation between the train scale and the Log Scaling Bureau's scale, but I think it is within three per cent in favor of the original train scale. We tried to keep our train scale down generally within five per cent. We got it within three per cent. Those

figures I have compiled, as far as the cut is concerned, from the original camp records of train scales. The amount under the head of "Scales" was taken from the original record either reported by the Log Scaling Bureau or compiled from the actual scale books."

MR. MONTGOMERY: For the preservation of the record, I desire to interpose a motion on behalf of the complainants to strike all of the evidence of this witness, upon the ground and for the reason that there are no facts alleged as a defense in this case which constitute fraud in contemplation of the law, and that the evidence is, therefore, immaterial to the issues in this case involved.

Objection overruled. Exception allowed.

On CROSS-EXAMINATION by Mr. Montgomery, of counsel for complainants, the witness further testified as follows:

"Discrepancies exist at times between different methods of scaling. A train scale is always a rougher scale than a raft scale. Two reliable scalers can make a variation as high as five per cent on scaling a raft."

THEODORE BROWN, called and sworn as a witness on behalf of the defendants, and in answer to interrogatories propounded to him by Mr. Kollock of attorneys for the defendants, testified as follows:

"My name is Theodore Brown. I reside at Portland, Oregon, and I am the President of Brown & Brown, Incorporated, dealers in timber lands. Cruising of timber for parties under contract is a part of the business of Brown & Brown, Incorporated. We had an order from Mr. R. C. Bell to

report on timber land in Wahkiakum County, Washington, and such a report was made. Defendants' Exhibit 'D' for identification is our report. Horatio J. Brown is the Secretary of Brown & Brown, Incorporated. He has charge of the field department of the business, and while this report bears the endorsement of 'Prepared by Brown & Brown, Incorporated, Portland, Oregon,' it contains a communication signed by Horatio J. Brown. Mr. Horatio J. Brown is a member of the corporation who is charged of the matter of cruising. The field department is entirely under his supervision and jurisdiction. Horatio J. Brown has had thirteen years' experience in the woods, and approximately seven years in the employment of the Government, during most of which time he had charge of the timber scales on various reservations. After his connection with the Government was terminated, and before the organization of Brown & Brown, Incorporated, he was in the employ of James D. Lacey & Company, working out of their Portland office for approximately eighteen months."

MR. KOLLOCK: I will now offer in evidence the report of Brown & Brown, Incorporated, on the timber in question, addressed to Mr. R. C. Bell, Portland, Oregon.

MR. MONTGOMERY: I desire the record to show an objection to the introduction of this document upon the ground that the allegations pleaded in the defense in this case are insufficient to constitute, in contemplation of law, fraud in a case of this kind, and upon the further ground that it appears from the testimony of the witness as to the identification of this document that the cruising was done by a party other than himself,

and that, therefore, the document in question is secondary evidence.

Objection overruled, Exception allowed.

Thereupon said paper was admitted in evidence and marked "Defendants' Exhibit D." It is stipulated that this Exhibit "D," consisting of photographs, tabulations and statement, may be referred to without printing.

H. V. CARRINGTON was recalled as a witness on behalf of defendants, and upon direct examination by Mr. Kollock of attorneys for the defendants, further testified as follows:

"I made a computation for my own information from the original records of Mr. Bell in connection with the Morley tract from the timber actually cut on the Morley property, as compared with hypothetical results on the basis of 11,584,000 feet of timber, exclusive of hemlock, as shown by the cruise, to see how we were coming out. I have a memorandum of those figures in my possession. First of all I took the total amount of our gross sales for that period; that is, sales during the period of the timber cut from that particular tract. In those sales, there was a certain amount of hemlock. During that period we sold the hemlock at \$6.00. So I took the total shown for hemlock, in feet, on a basis of \$6.00, and deducted this from our total sales; this showed that we made actual sales and received money for the same—fir, cedar and spruce, 8,412,516 feet. That, of course, included three or four hundred thousand feet of timber purchased from Johnson, but, as necessarily goes, we could not distinguish one log from another. We actually received for that timber—for these logs—an aver-

age price of \$9.55 which made a total sale—gross sale—of \$80,319.91. Now, our timber was to cost us \$30,000.00; therefore, our gross profit, as between merchandise sold and merchandise purchased, was \$50,319.91. Now, on our expense, both operating, construction and overhead, the way we run our accounts there is only one fluctuation and that is on logging the raft. I cannot say that the overhead and the operation is one charge on that one class of labor. As between 11 million and 8 million, for this reason: That our blacksmith account would necessarily remain the same. Our actual expense consists of bookkeeper's and foreman's time. That is a fixed charge. Our industrial insurance necessarily remains the same. Our railroad operation, consisting of locomotive engineer and two brakemen, remains the same. Our rights of way remain the same. Therefore, the only difference is our logging 8 million and any other amount during the same period would only be the pro-rata; as a matter of fact, it would not be pro-rata, because, taking the same section, it does not cost twice as much to do the work in the woods to get out ten million as it does to get out five. It does not cost very much more to log; it is getting ready to log that costs the money. However, I have allowed the pro-rata in default of being able to fix on any other definite rate. As a matter of fact, it would cost less than one-half of the pro-rata to get out an additional two or three million. Showing the actual sales as a basis, we find, as I said, that our gross profit was \$50,319.91. Our operating expense, as explained in detail, actually cost us \$45,096.05. That left us a profit of \$5,223.06. Our railroad construction and maintenance during that period, for that particular tract, cost us \$10,439.48,

so that our net operating and construction loss was \$5,215.62. Our overhead expense would naturally remain the same in each case. What we call overhead is our general office expense, interest charges, salaries, traveling expense, and taxes. These, during the period of the cut, amounted in all to \$11,344.59, showing a final loss on the operation of \$16,560.21. On the other hand, taking as a basis the supposed cruise of 11,584,000 feet, I have deducted from that 1,200,000 feet which we admit was inaccessible and had to be abandoned. That leaves 10,384,000 feet to which, of course, must be added timber that we purchased from adjacent lands, amounting to 393,792 feet. On that basis, we could have sold 10,777,792 feet, for which we would naturally have obtained the same average price of \$9.55, so that our gross sales would have been \$102,927.91. From that I have deducted the Lacey charge for the timber purchased, \$30,000. Our gross profit, therefore, as between merchandise purchased and merchandise sold, would have been \$72,927.91. Our operating expense would be the same as in this statement with the exception of our logging and rafting charge. As I said before, I have increased that pro-rata with the hypothetical cut, although that is not true. Blacksmith and other operating expense would remain the same. The result of that computation would be that our operating expense would have been \$54,418.19. This deducted from our gross profit, would leave an operating profit of \$19,509.72. Our railroad construction and maintenance would naturally have remained the same, \$16,439.48. Therefore, our net operating and construction profit would have amounted to \$8,070.24. Our overhead expense would have remained the same except that the dis-

count on the increased sales figured on a basis of 60 days at 7 per cent, would have increased our interest account by that amount. Our overhead expense would have been, therefore, increased to \$11,608.35, in which case, our final loss on the operation would have been \$3,538.00. This shows that on account of the shortage in the cruise and the fact that our expense was, not in logging, but in getting ready to log, our loss was greater than it would have been had the cruise held out, by \$13,022.10; in other words, the shortage on the cruise cost us at least \$13,000.00; probably in reality, cost us more."

On CROSS-EXAMINATION by Mr. Montgomery, of counsel for the complainants, the witness further testified as follows:

"It is practically true that the charge to railroad which I itemized applies to each of the other items as expense in hauling timber from such lands which have been since purchased in the vicinity of the tract in question, but I have used the same figures in each set. I understand that we are now logging from lands in the rear of this tract by this railroad. I have not been down to the camp this year. Our records, however, show that fact. I always make it a point to figure out the profits received from each raft. During the period of time we were operating down there I do not know that the market for cedar was particularly different than the market for any other logs. I have forgotten the exact proportion of cedar marketed. I have not got that in my summary. I have got the fir, cedar and spruce altogether. I have forgotten the exact amount. I do not recall that there was any good market for cedar during the period of this operation. Referring to certain

timber as being inaccessible, I mean that the lay of the land was such that to make preparations would have cost us more than the timber was worth. That is not part of the timber included in the forty acre tract. I guess that we included in that one million two hundred thousand feet of timber the timber on the forty acre tract."

Q. Now, you have spoken of the expense of operating; is there any expense in fuel for camps?

A. Why, you may have—fuel for what?

Q. For camps, in general; cook-houses, and the like?

MR. KOLLOCK: I submit this is not a proper cross-examination. This man does not purport to have a thorough knowledge of the carrying on of the work in the camps. This gentleman is an accountant.

THE COURT: Objection overruled. He may answer.

A. I have been down to the camp several times, as once I required them to get up a statement for reference for that purpose.

Q. How about the expense for operating donkeys?

A. In cutting down a tree there is a certain amount of waste, that is all.

Q. You were down on the ground to see these operations?

A. I did not make any effort to be there. I have been there on several occasions.

Thereupon, defendants offered in evidence the statement from which this witness testified, which

said statement was admitted in evidence over the continuing objections of the complainants, and marked "Defendants' Exhibit J".

MR. KOLLOCK: I desire this in evidence as part of the testimony of Mr. Brown, being a report of the amount of timber left on certain lands, prepared by Brown & Brown, Incorporated, of Portland. (Reading from Defendants' Exhibit "D").

JOHN K. KOLLOCK, of counsel for the defendants, was called as a witness on behalf of defendants, and testified, over the continuing objections of the complainants, as follows:

"At the time of the execution of the preliminary contract of purchase of this property, a definite agreement of purchase and abstract of title, which has been introduced in evidence, was handed me by Mr. R. C. Bell, with the original opinion on the title of Platt and Platt, addressed to James D. Lacey & Company enclosed therein, with the statement that it had been kept by Mr. Lacey for examination of title. I made an examination of the title and found the title to all of the tract, except the southeast of the southeast quarter of Section 24, to be satisfactory. As to that particular 40, my attention was immediately attracted to page four of the abstract which was a conveyance from Christopher William Whitford and wife to Ernest Strong, purporting to be a conveyance of the timber upon this property, the southeast of the southeast of Section 24. That instrument is shown by the abstract to have been recorded on August 14, 1906, in book "A" of Miscellaneous Records. A subsequent conveyance was made by Mr. Strong, the grantee

in that deed, which property, in this abstract of title, said to be vested in Ernest Strong by that deed was subsequently conveyed by this conveyance to Mrs. Morley. Subsequently, however, the grantor in that deed, by a more or less extended series of conveyances, conveys the land to other parties, some of whom appeared by the form of the conveyance, which was subsequently shown, to be residents of New Mexico. I advised Mr. Bell that in my opinion that instrument purporting to be a timber deed was not sufficient in itself, recorded in the miscellaneous records, to constitute constructive notice to a subsequent purchaser of the land, unless he could show actual knowledge in and of the fact that this instrument was outstanding, and would take the land and all these hereditaments, irrespective of these conveyances,—the miscellaneous records, in my opinion, not being a part of the legal records of the State, but being merely a scrap book for the purpose of preserving evidence until actual knowledge could be shown. I personally took up the matter immediately with the attorneys for Mrs. Morley, with Mr. Harrison G. Platt, the head of the firm of Platt & Platt. My recollection of the conversation with Mr. Platt is that he said that it was not sufficient to constitute constructive notice and that steps would be taken to procure title to the property. At the time that the deed was ready for delivery, or shortly before that time, I was advised by some member of that firm that Messrs. Platt & Platt would agree to give an agreement of indemnity signed by themselves personally to protect Mr. Bell under these circumstances.

That was entirely satisfactory to me, and I so advised Mr. Bell, the financial responsibility of these gentlemen being unquestionable, and the agreement—so-called agreement of indemnity—which has been introduced in evidence, was delivered to me and by me to Mr. Bell. That agreement recites that they would procure and vest in Mr. Bell title to the property and in default thereof would indemnify him against loss occasioned by his cruise of the property. I had a number of interviews, from time to time, with various representatives of the firm of Platt & Platt, particularly Mr. Hindman, at the time we entered into a stipulation for an extension of time to complete the case, to file the reply of the defendants in the case, and on another of these interviews, about five months ago, at the time the last stipulation for an extension of time was filed, Mr. Hindman stated it was the present intention of the firm of Platt & Platt to postpone the prosecution of this case until they had been able to answer in action at law upon previous warranty. Subsequent to this, perhaps two or three weeks after that, Mr. Hindman again came into the office and served me with notice that the case would be set for trial. He said they had decided to go ahead with the case. In addition to being attorney for the company, I am secretary of Mr. Bell's company, and at no time was any notice brought to my attention that title had been perfected or that they were able to or ready or willing to deliver title to this forty acre tract until perhaps two weeks ago, when I was discussing over the phone with Robert Treat Platt the question of the trial,

the time of the trial and so no. Some question came up about this agreement and he said to me then that they had procured title to the property. I have no other knowledge of any attempt to procure title."

On CROSS-EXAMINATION by Mr. Montgomery, of counsel for complainants, the witness further testified as follows:

"I am not clear as to whether or not the indemnity agreement given by Robert Treat Platt and Harrison G. Platt provided that they were either to get him a deed or protect him (referring to Mr. Bell.) At any rate, in connection with that, I would like to say that the question of indemnity came up several times. I told Mr. Bell that the absence of any affirmative action on the part of Mrs. Morley to vest title in him—in my opinion there was no title vested in Mrs. Morley—he should not attempt to operate on the property, because the mere agreement of indemnity did not protect him against trespassing on somebody else's land. I consider that there has been an assertion by some of the predecessors of Mrs. Morley to the title of this land. Christopher William Whitford and his wife are the parties who conveyed. I consider this subsequent conveyance of William Whitford and his wife to other parties of the title by deeds reciting conveyance and warranty without limitation, to be express assertions of their right to this land. I am not sure as to whether the first conveyance was a quitclaim. I found by the abstract which has been introduced in evidence, and which I had in my possession, that on June 10, 1908, which was two years after the conveyance to Ernest

Strong of the timber by the so-called timber contract recorded in Miscellaneous Records, Christopher William Whitford and his wife, by warranty deed, conveyed the property in question to Howard S. Smith, which instrument is recorded and shows on page 18 of the abstract. By the grantors there was a quitclaim deed between that deed and the deed that was recorded in miscellaneous records. This conveyance was by the grantors, who were the same grantors that recorded their deed in miscellaneous records. I have not, as attorney for Mr. Bell, and I do not think that Mr. Bell has, ever made an assertion or claim against Mr. Robert Treat Platt or Harrison G. Platt, or either of them, on account of any attempt or assertion in writing as against the title to this forty acres in question here. I consider the deed and this indemnity agreement to procure title, or in default thereof to indemnify him and protect the rights of Mr. Bell as against the grantor; we had the alternative of asserting these rights as we saw fit. Mr. Bell had knowledge of that fact before the mention of this title indemnity agreement. I would say that as to the rights of the title, Mr. Bell consulted me as to whether the deal could be closed. The rights of title being delivered, Mr. Bell being satisfied as to the amount of timber thereon was desirous of closing the deal. He asked me if any arrangements could be made by which he could go ahead and close the deal irrespective of the defective title. He had full knowledge of the title."

Thereupon the defendants rested their case and

complainants thereupon made the following motion, to-wit:

Before proceeding with the introduction of evidence by way of rebuttal, I desire on behalf of the complainants that the record show a motion to strike all of the evidence introduced upon behalf of the defendants in this case, on the ground that the same is incompetent, irrelevant and immaterial under the issues made by the pleadings in this case, and submit these theories as against the allegations of the answer filed by the defendants in this case, upon the following grounds and in the following particulars: *First*: no defense of false representations has (as has been pleaded,) been shown, it being alleged merely that the complainants represented through their agents that a certain specified cruise showed a certain specified number of feet; *Second*: That the evidence introduced in behalf of the defendants shows the absence of any intent to deceive such as is necessary in defenses of this kind, in that it appears from the testimony of Mr. Bell that Mr. Langille, acting for James D. Lacey & Company, stated to him matters merely pleaded; *Third*: That the facts stated in the defense of fraudulent representations does not state facts sufficient to constitute fraud in the contemplation of the law; *Fourth*: That the evidence introduced in behalf of the defendants as to the question of title is incompetent because the evidence of the defendant shows that a deed was given at the time of the purchase and sale of this land and that the covenants of such deed, if any, controlled over any oral agreement of the parties of any intended un-

derstanding or purpose; *Fifth*: That in the defenses pleaded in this case, no breach of covenant, express or implied, is alleged; *Sixth*: That the evidence introduced on behalf of the defendants is entirely insufficient to show any effort upon the part of the defendants to procure the timber standing upon the so-called forty-acre tract; no evidence of any excuse for not procuring said timber; and no evidence of any sufficiently legal excuse for not procuring said timber on account of such alleged defect of title, has been introduced, and the evidence introduced on behalf of the defendants affirmatively shows that this was a defect—that the alleged defect of title was not a defect in the absence of some overt act or the assertion of some right; upon the further ground that it appears from the evidence introduced in behalf of the defendants that the reason why the timber on the so-called forty-acre tract was not procured was that the same was inaccessible and the failure to procure it was not on account of any alleged defect in title but was because, as testified by witnesses in behalf of the defendants, of the poor condition of the country and their desire to play safe.

THE COURT: I might be inclined to hear from the other side on some of the grounds in your motion, were it not that the case is liable to be appealed. All these matters will be considered in the findings after all the evidence is in. Motion denied. Exception allowed.

Plaintiffs' Rebuttal.

H. D. LANGILLE, a witness called on behalf of the complainants, in answer to interrogatories pro-

pounded by Mr. Montgomery of counsel for the complainants, testified as follows:

"I am with the firm of James D. Lacey & Company, Manager of the Portland office, and was manager of the Portland office during the years 1911 and 1912, when the transactions involved in this case were negotiated. Prior to the ultimate sale of the real property involved in this suit I had conversations with Mr. Bell concerning the timber involved here. I was present yesterday and heard the testimony of Mr. Bell that at a conversation held with me the deal was talked over and immediately closed. I have a method of fixing the date of that conversation from correspondence in my files. This letter dated October 30, 1911, addressed to Mrs. Fred Morley, is a copy of a letter written by me as representative of Lacey & Company, who were the agents for Mrs. Morley."

Thereupon said letter was introduced in evidence without objection, for the purpose of establishing the date as testified to by the witness, and was marked "Plaintiffs' Exhibit No. 3." As the only purpose for which this letter was admitted in evidence was to establish the date, the said letter is not included herein.

"Nearly six months elapsed between the date of this conversation with Mr. Bell and the date when the option introduced in evidence yesterday was finally given to Mr. Bell. The substance of the conversation which I had with Mr. Bell at that time is as follows: At the time the preliminary negotiations were taken up, in response to a letter which I addressed

to the Campbell Logging Company at Deep River, Washington, Mr. Bell called at the office. The letter which I referred to is one I think Mr. Kollock introduced in evidence. Mr. Bell seemed to have some knowledge of the property. I described it to him, probably showed him the plat, and he stated to me that he was more or less familiar with the country; that he had been logging in the neighborhood in the same kind of timber, and that he had some general knowledge of this tract. We discussed price and the amount of timber, and I think it was at that time that we discussed terms of sale. Mr. Bell stated he would look the property over with his foreman, and asked me to make a proposition to the owners of the property along the lines which he would undertake to purchase it. As agents for Mrs. Morley we were charged with the investment of her funds. We had purchased that property for her in 1910; purchased it for her account. For the purchasing, we made what we term a preliminary cruise, which is a twelve and one-half per cent. cruise. In other words, counting the trees and so forth on $12\frac{1}{2}$ per cent of the land; simply going once through each forty. The preliminary examination was satisfactory and subsequently, by the cruise of the property, we made a 100 per cent. cruise going eight times across each forty and counting and examining all of the trees as nearly as practicable. On that cruise we purchased the property. That was the cruise that was discussed between Mr. Bell and myself at these negotiations. That memorandum, to which you called my attention, was prepared in my office from

the original field books returned by the man in charge of the cruise, Mr. Collins. I am pretty sure that during the conversation with Mr. Bell that statement was submitted to him in my presence, and must have been because—I cannot swear positively that it was, but I know it is customary in matters of that kind to state all the information that we have.”

Thereupon said memorandum was offered and admitted in evidence without objection, and marked “Complainants’ Exhibit No. 4.”

“I submitted Mr. Bell’s proposition to Mrs. Morley; on November 21, 1911, I advised Mr. Bell that his proposition was accepted. At about that time, the memorandum of agreement covering our understanding in the case was prepared and that was forwarded to Mrs. Morley on the 24th day of November, 1911. Under the terms of that agreement he should have exercised his option and made the first payment on the property on the 22nd day of February, 1912, four months after the date of our original understanding. At about the time this payment was due and the option was due and expired, Mr. Bell came to see me and stated that during the life of the option he had been making an effort to procure a right of way from the lines under construction to the timber at the river; that he had met with difficulty in securing some of this right of way and asked for further time to which to complete his negotiations; he asked for sixty days. I submitted his request to Mrs. Morley and it was granted. Mr. Bell was given an additional two months’ time in which

to complete his arrangements for taking over the property. Subsequently, on the 22nd of April, 1912, he assumed charge.

"That letter to which you direct my attention, dated November 24, 1911, addressed to Robert G. Bell, was from James D. Lacey & Company to Mr. Bell."

Thereupon said letter was offered and admitted in evidence, without objection, and marked "Complainants' Exhibit No. 5." This letter was dated November 24, 1911, and admitted for the purpose of fixing said date.

"Mr. Bell stated he would rely on our cruise. I asked him on one or another of the interviews we had; while this option was pending we met at different times; I asked him if he had looked over the property, and he stated that he had done so with his foreman. I asked him if he was going to cruise the timber and he said 'No. You are recognized timber cruisers. There is the timber estimate. I rely upon that.' I cannot recall that he stated as the result of his investigations that he believed that number of feet of timber was on the land. During the course of these conversations with Mr. Bell, he made statements to me with reference to the procuring of lands back of this tract. The substance of that was that he desired to procure the Grays River tract, because there was certain of said lands which he expected to acquire, and the Morley lands and the Grays River tract would give him a right-of-way to said lands. I believe that Mr. Bell's negotiations for these lands were being carried on during the life of the option.

"In the capacity of one actively engaged in forestry and matters pertaining to forestry, I have been in it since the spring of 1900 when I entered the Government service. I was engaged in forestry work for the Government for six years, after which I attached myself to the firm of James D. Lacey & Company. I have had general supervision of all the cruising done by my firm. I have spent a great deal of time in the woods cruising, checking cruisers, investigating logging operations, manufacturing, practices in the course of logging business and the reporting upon such propositions. I do not know from my own personal experience whether or not there is any general average of consumption of timber used in connection with the operation of donkey engines in logging, but in the course of business I have had occasion to acquire that information. I have studied many authorities, and I am told that the consumption of wood in the donkey engine varies from 15 to 25 hundred feet a day according to the character of the logging and the dryness of the season; that is, the engine burns more wood in dry weather than it does in wet weather. Generally, the best timber is used in the operation of these donkey engines."

Q. I will ask you to state whether or not in the cruising industry there exists any general practice with reference to the recognition of a standard of variance between the amounts shown by a cruise and the amount of timber which should be removed from land by reasonable, careful methods of logging?

A. "I always figure ten per cent, difference between the amount of timber shown by a cruise and the amount of timber which should be removed from land by reasonable, careful methods, as being a satisfactory test. In our work I do a great deal of rechecking among our own men in order to establish uniformity, and if a piece of timber has been cruised by one of our men and re-cruised by the head cruiser for checking purposes, and if they come within ten per cent. we regard it as satisfactory. If it is more than that the work is done over."

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the defendants, the witness further testified as follows:

"We do a great deal of cruising for prospective purchasers of timber, and have done a great deal in past years. It is hardly a correct statement that our Company is considered, in the community where we operate, as being very conservative cruisers. We are regarded as being estimators who seek to report the actual amount of timber on the ground as it should be removed by reasonable, careful logging. That is the ambition of our business.

"In most logging work oil is favored as fuel, that is, in modern logging. In most logging camps on the Columbia River oil is used as fuel, but I cannot say positively that that is true of all the camps on the Columbia River. I have not seen the operation of the Whiting Timber Company at the mouth of the Columbia River. That is one of the larger operations on the Columbia River at the present time. I have not visited in recent years the operations

on Deep River of the Deep River Logging Company and do not know whether they used wood or oil. I understand that the Portland Logging Company in Wahkiakum County burns oil. I do not know of my own knowledge, for I have not visited the camp. In some cases purchasers who have bought timber by our cruise have shown an overrun and in some cases an under-run. Ten per cent overrun would not be considered a very serious reflection on the ability of James D. Lacey & Company as timber cruisers. I think it would be an excellent showing. Twenty-five per cent underrun is a serious matter, but that is a matter that would depend very largely upon the method employed in removing the timber.

"I know Horatio J. Brown personally and by reputation. His ability and standing as a timber cruiser is good. He was trained in our organization. I would be willing to accept his estimate under ordinary circumstances as to the amount of timber improperly or carelessly and improvidently left upon the tract.

"I first took up negotiations for Mrs. Morley for the purchase of this tract by her in October, 1910, she paying fifteen thousand for this timber."

- Q. Then in your letter which has been offered in evidence when you state "If you think it advisable to take charge of this property we urge that you do so, you will be enabled to earn on your investment price within 12 or 15 months." you mean a profit of 100 per cent. on the investment?

A. Less carrying charge.

"I have no recollection of having handed a

copy of that summary to Mr. Bell, but as I say, in the course of business, and anything we had bearing upon the value or character of the property was open for Mr. Bell's examination. We had a good deal of talk relating to the values of the timber and I made it very clear to Mr. Bell at all times that we were selling him so much land for so much money. That we were not undertaking to guarantee our cruise. We never guaranteed any cruise. We simply represent it according to our cruise. That is all we can do, because no man can guarantee a cruise. I have no recollection of Mr. Bell saying to me 'Mr. Langille, it would not be business if I am to buy this property, unless there is twelve million feet, exclusive of hemlock, and if you show to me there is twelve million feet there I will take this at \$2.50 a thousand feet,' nor do I have any recollection of having replied, 'You may rest assured that is a fact.' "

THE COURT: That was not his testimony. He says, "we were told he believed it would run out twelve million feet."

"I do not recall that conversation. We might have said to Mr. Bell there was a chance there would be an overrun on that tract."

On RE-DIRECT EXAMINATION the witness further testified as follows:

"A mill purchasing timber does not customarily deduct from the purchase price the amount to be consumed in donkey engines."

On RE-CROSS EXAMINATION the witness further testified as follows:

"When a cruise is made, the old fully grown

and matured timber, yellow fir, a substantial cut is made from the apparent cruise as compared with the regular cruise in young growing timber. It is impossible to say how much of a cut from the normal cruises I would consider should be made in old timber with any degree of accuracy, for the reason that in all our estimating each tree is estimated for what we believe it will hold. If a tree is large and shows some signs of visible defect, that defect may be a stump-rot, may be a dead top, may be away from a railroad; may be where you cannot fell it without breaking it up. There is no way of reducing ten per cent., five per cent. or twenty per cent. from the total upon all the other timber for that would be manifestly unjust. It would not be a proper reduction, to go through a tract and make a cruise from tree to tree carefully and count them, and at the end make a general deduction from the total, based on the fact that this timber was very old, and that there was noticed more stump rot and more dead, defective timber than would be apparent on the face of it. Such a deduction would not be practical, because no practical man can, from some strip of timber or some trees, determine the amount of defect or the amount of logs which should be taken out on that particular area and then deduct the total loss from the whole tract.

“On the southeast of the southeast of 24, there were only forty acres included in the section on the original cruise. The figures of 332,000 furnished to Platt & Platt, to be included in the specific agreement they were to make, came from our office.”

W. G. COLLINS was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery, of counsel for complainants, testified as follows:

“I am Assistant Manager of the Portland office of James D. Lacey & Company. During the years 1910 and 1911, when the transactions involved in this suit were negotiated and consummated, I was a timber cruiser. I cruised about half of the timber involved in the controversy. I had charge of the work of cruising. These memorandum sheets are the original figures showing the cruise upon each quarter of a quarter around this entire tract. The total of each forty is on each one of these sheets. The entries upon these sheets were made by myself at the dictation of the other cruiser for the work that he did and from transcription of my figures for work I did. These transcriptions were made from celluloid tab that we used in the woods.”

Thereupon, said documents were offered and admitted in evidence, without objection, with permission to substitute copies later, and marked “Complainants’ Exhibit No. 6 and 7.”

It is stipulated that these exhibits 6 and 7 contain the entries as above testified to and may be referred to without printing the same, because it is practically impossible to print them so as to be intelligible.

“That cruise was what we call a three man cruise; 100 per cent. In order to do that work, in the first place we established our corners and run the necessary return lines, necessary

section lines and set stakes at stated distances on which to check up the parallel strips. We then set to work and run eight parallel lines across each forty acres and that line we run by a compassman and the cruiser follows this compassman around and estimates all the trees for a distance, or we work one-fourth of a tally, 82,000 feet, on each side of the compass line; eight of these strips in each forty; forty is four tallies long and a tally is 330 feet; so when we get through with work on that line, why, we have reasonably seen every tree and made the necessary estimates from the timber as we see it on the ground. I understand at the time we made the cruise on the timber involved in this suit that it was made for the information of a possible investor. I did not know at that time for what investor. The work done by me as a cruiser in cruising timber involved in this suit was conscientiously done according to recognized and established methods of cruising. The extent of my experience as a cruiser is as follows: I have been working in the woods on the coast for eight years. Since 1907 I have been connected more or less with the firm of James D. Lacey & Company as a cruiser. It is the general custom and practice with reference to the recognition of a standard of variance between the amount shown by a cruise and the amount of timber which should be removed from land by reasonably careful logging methods, it is generally expected, as Mr. Langille stated, that a difference of ten per cent. one way or the other is not unreasonable. I have made an examination of the lands involved in this suit for the purpose of determin-

ing the methods employed by R. C. Bell in removing the timber from the tract described in this case. It was made last week. That would be June 11th, 12th and 13th. These photographs were taken by myself on this Grays River tract during this last examination of the timber there."

Thereupon said photographs, as identified, were offered and admitted in evidence, without objection, and marked "Complainants' Exhibit No. 8."

It is stipulated that this exhibit No. 8 consisting of photographs may be referred to without printing.

"During this recent visit to the property I did not make a detailed cruise. I just made an examination. On this last examination I made a detailed cruise of the standing timber that was remaining in the southwest corner of Section 19. On the rest of the tract the timber had been felled and bucked and most of it removed. I did not make any detailed estimate of the timber left standing on the rest of the tract, but I made a number of estimates, to which I will refer later.

"This first picture (indicating) which I come to here is one of a tree left standing on the southwest corner of Section 19. That tree is ten feet ten inches in diameter and we estimated on a conservative basis that it should contain 40,000 feet; exceedingly large tree (fir). Not far from that tree, perhaps not over what we call a half tally, or 165 feet, from that tree was this stump (referring to photograph) which is standing just over the ridge where this standing timber is and from that stump was felled this tree (indicating)—on the south-

west corner of 19. That tree is left in the woods entirely. I will refer to a memorandum. I have the dimensions of that tree. It was (referring to memorandum) eight feet three inches on the stump. It was felled across this sharp ridge and down into the steep slope and the entire tree left on the ground after it had been felled and bucked; 68 feet from the stump the tree was smashed and the rest of it was ruined. Ten rods, 160 feet, from the stump the tree was still 54 inches in diameter and according to the log scale the tree should have contained 36,000 feet. This picture here (indicating) shows the character of the wind falls that were left. This picture was taken—I am quite positive that was taken on the southwest, on the southwest corner of section 24.

“This picture which I have here (indicating) is a picture of a spruce tree which is on the southwest quarter of the southwest, of section 19. The dimensions of this spruce, all of which was left on the ground—it was 6 feet 2 inches on the butt, and contained, after making a deduction of 25 per cent, for possible defect in the butt log, the entire tree contained 15,300 feet; that was taking it 112 feet in height; in other words stopping before the limbs got too large. This (indicating) is of two spruce; the larger one we estimated to contain 15,000 feet. That was left standing on the southwest of the southwest in section 19. This one (indicating) is taken on the southeast of the southwest of section 19. It shows a spruce tree felled in a steep canyon; in fact, it shows two spruce trees, with cedar falls across it. This picture (indicating) was taken on the southwest of the southwest of

20, and showed the high stump and that particular stump was 72 inches in diameter, and according to our estimates if it had been cut four feet lower, as a conservative logger would have cut it, it would have saved 2,000 feet. This picture (indicating) was taken on the northwest of the northwest of section 29. Shows the character of some of the windfalls left on the ground. We estimated there was three thousand feet left in that tree. This view (indicating photograph) was taken on the southeast of the southwest of Section 19, and shows at the top a large spruce log left on the ground. This picture (indicating) was taken on the northwest of the southwest of Section 20. That particular picture shows two large fir trees. One was felled across a sharp—one tree was on top of the other tree and was broken. I might say that this larger tree was not put where the fellers intended to put it; probably was no fault of the logger. The tree apparently had a heavy leaning and got away from the fallers, but the second tree—upper one—there apparently dropped in that steep gulch. This picture (indicating) was taken on section 29 and is intended to show a spruce stump and a fir stump back in the timber there. Both of those were very large trees and were felled right into the steep canyon. In addition to these pictures, I have a number of estimates—There is another stump on the southeast of the southeast of 19; stump was 7 feet 6 inches in diameter and standing on comparatively level ground and that stump was 6 feet 6 inches high above the roots. If it had been cut about three feet lower, as it should have been, it would have saved

two thousand feet. Also on the southeast of the southeast of 19 there was an eight-foot tree entirely left on the ground, which, according to logging scale, making a proper deduction for some rot on the first log, scaled 27,207 feet. the full volume of that tree would have been 39,000 feet. There was one felled on Section 29, 6 feet at the stump, and contained, according to our estimates, 12,000 feet. Right next to that was another one felled with seven thousand feet left in the top.

"I think the photographs which I have referred to, and which have been introduced in evidence, constitute a fair average of the conditions that I found upon this investigation. Based upon my experience in the cruising and timber industry, more particularly my experience in the recent investigations about which I have testified, I do not consider that this timber was logged by careful, workmanlike logging methods.

"Based upon my experience, I think it is generally found that the amount of timber consumed by donkey engines will range from fifteen hundred to twenty-five hundred feet a day, depending upon the conditions under which they operate. The character of timber used in the donkeys is necessarily good timber, because in order to make steam they need good live timber. I was going to say there, as far as tops are concerned, where the knots are large, it is impossible to split them. I gave particular notice with reference to the condition of the cedar upon the property along the south line of section 19, just west of quarter post. This investigation was practically entirely in

the southwest quarter of 19. There was a considerable amount of cedar that was practically totally smashed. It was smashed by being dropped down steep side hills, and from an inspection of the stumps, so far as we could see, there had been no use of a wedge, no effort made apparently to save the tree. Wedges are used to fix the direction in which the tree is to be felled. I understand that the market for cedar during the past few years has been very good. I will say, however, that I am not personally in touch with the market. During this investigation an estimate of the amount of good, merchantable timber left standing upon the land involved in this suit, together with the approximate amount consumed in the donkey engines and in camps and elsewhere during the period of operations, was made. The judgment of the man who made the estimate was, that the excess in breakage, amount of timber standing on the ground and the amount of timber consumed in the donkeys would total 3,500,000 and 3,600,000 feet.

"Mr. Bell, during the period of the operation of the lands involved in this suit, did not from time to time make reports of the amount of timber that he was taking from the land."

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the defendants, the witness further testified as follows:

"In stating what is my opinion as to the amount of merchantable timber left on the tract, I can simply repeat what I just said. I could make an estimate eliminating the fuel, saying that the fuel would be from a million

to a million and a half feet. I think that the estimate of Mr. Horatio J. Brown to the effect that 1,200,000 feet is the total of merchantable timber left on the tract is pretty safe. I consider Mr. Brown a competent cruiser and estimator. I have worked with him many years myself. I do not think that the greater part of the photographs which I have shown here were taken on the southwest quarter of section 19. I think a good many of them were, but a number of them I mentioned were taken in section 18, in section 20, and the northwest of 29. All the photographs exhibited showing standing green merchantable timber were taken in the southwest of section 19, southwest corner. In proportion to the number of trees I noticed too many high cut stumps. Whether the stumps were cut higher than normal would be a difference in judgment, and I differ slightly with Mr. Brown in that respect. I cannot remember the number of stumps of that character; 435 trees on that tract. Practically all the merchantable green timber that I found which could have been removed was on the southwest of section 19. I found on that same quarter a considerable amount of timber cut, some of it even bucked, and not removed. That was not practically the only part of the entire tract where I found that condition of timber cut and bucked but not removed. I found in section 20 a more aggravated case. I did not attempt to make a cruise of all the tract, because I have one already made. We have one that was made a year ago. I do not like to make a positive statement as to whether or not the report made by Mr. Brown is correct without being on the ground. I did not

make as full and complete account as shown by Mr. Brown's report. I made the original in the southeast of southeast quarter of 24, and this last time I did not make any examination of that. I could see it was still there. No evidence has been given on the southeast of the southeast of 24. The only knowledge I have as to the consumption of wood as fuel by Mr. Bell or his company is that in all the camps that he is operating at the present time that I visited I noticed the character of the logs that the donkeys were burning. The only camp which I visited is the one in section 29. I do not know what foreman is in charge of that work. I do not know whether he is the same foreman who was in charge when he was operating on the Morley land. The observation of this operation and my knowledge of other operations that I have observed in other camps is the limit of my knowledge as to what is done for fuel. I think most of the up-to-date camps use oil. I do not know the reason why the camps on the Columbia River use oil, and I do not know whether all of them use it or not. I consider the use of oil the more up-to-date method. I think it has been within the past two years that they have been using oil. Prior to three years ago oil was not used in donkey engines. The customary method of firing engines up to that time was with wood. Some of the camps have gone so far as to use electricity, but I think that is not the practice in this country."

On RE-DIRECT EVAMINATION the witness testified as follows:

"Oil and electricity is used in reducing of their cost. In other words, in order to do away with the burning of good timber."

On RE-CROSS EXAMINATION, the witness further testified as follows:

"One of the factors in using oil and electricity is that it reduces the fire risk. That is one of the arguments that is used in reference to the introduction of electricity."

ARTHUR THRANE was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery, testified as follows:

"At the present time I am engaged in cruising, and have been engaged in that business for nine years last past. In conjunction with Mr. Collins I assisted in the cruising of the timber involved in the controversy in this case, known as the 'Grays River Tract.' Referring to complainants' exhibit 6 and 7, will state that I made a cruise of that portion of the timber referred to on said sheets, except a portion cruised by Mr. Collins. I heard the testimony of Mr. Collins this morning regarding the method of cruising in this case. The general scheme of operating as outlined by Mr. Collins in his testimony, as applied to the specific cruise in this case, was correct. The work done by me and Mr. Collins as cruisers upon the timber involved in this controversy was done conscientiously, and according to recognized standards of cruising. There is a practice or custom amongst cruisers, which recognize a standard of variance between the amount of a cruise and the amount of timber which should

be removed from the land by reasonably careful methods of logging. The percentage of variance recognized by that custom or practice would be about ten per cent."

J. E. CROMAN was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery, of counsel for the complainants, testified as follows:

"I am logging down in Tillamook. Have been engaged in the logging business between 18 and 20 years. I logged four years in Lake Superior country, California, Oregon, Washington, Pacific Coast. During the conducting of the active timber operations of Mr. R. C. Bell upon the land involved in this controversy, I went down there and made an examination of the methods of operating that were being carried on by Mr. Bell. I consider their work very poor. There is one large tree there with three breaks in it. It is more or less the fault of the tree, so I did not consider it a poor job. The foreman of the camp stated the only thing he could do was to rush it, and that he was going to jack up the boys a little bit. He also said he was going to jack up the fallers a little bit there. The railroad was wrong in the first place, and necessarily caused more donkeys to be used and they necessarily burned more wood than they should, because it does not pay to fix up for oil on a small tract of timber on that single tract there. Coming up on the train from down there I had a conversation with Mr. Bell. We discussed the thing in general. He said he had a new foreman in there and he thought he would do better. This foreman

I was talking to before we got on the train, but am sure the man can make some difference in the estimate. I made a statement to Mr. Bell at the time regarding the differences which I found. I stated I thought it would cruise up all there was in it, and if they were careful about the management they will get it all out. Mr. Bell is right there now. I think he understood it that way too."

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the complainants, the witness further testified as follows:

"I do not think the land would cruise any more because the timber looked old and defective. I don't like the appearance of the timber, to tell the truth. I think you would have to have pretty competent fallers in there to save it. I ran a camp for seven years and I know I would not have it because they broke it all up. There was nothing to log. I believe they would have to be pretty careful to get more timber out of it than was estimated. I just glanced it over."

All of the large trees were estimated on the high ground and if they were not careful they would break up more than they ought to. That is what I thought of it. Stumps pretty high. Some of the trees 80 or 90 inches across the same. Very incompetent work done in some of it. I saw many of these stumps and called the attention of the foreman to it. I do not remember how many stumps I saw. I looked it over in general. It seemed to me, however, there was no particular attention paid to careful falling at all. They did not pay much attention to it. It would have taken a very

careful logger to have cut out what it cruised. From my experience I believe it would cut out, with careful work, what it cruised, because I know Mr. Collins's work and he cruised it. Very careful methods would have to be exercised to get the timber out of it. That is the only way I could answer that because it was poor falling down.

J. F. KING was called as a witness on behalf of the complainants, and in answer to interrogatories propounded by Mr. Montgomery of counsel for the complainants, testified as follows:

My business is cruising timber, and I have been engaged in that business in the neighborhood of twenty years. I was on the lands involved in this suit the latter part of October, 1913, and was there for the purpose of seeing the general conditions under which the logging was being done. I went down there to ascertain how much timber had been left on the ground, that is, timber that should have been logged, as well as some of the timber that had been felled and bucked and left. I found on the southwest of the southwest of Section 19 in the neighborhood of 375,000 feet to 400,000 feet of timber including green standing fir, dead and down, some spruce and the balance was timber that had been felled and left. I had a conversation with the fallers at the time, on one of the forties they were working on Section 29. The conversation referred principally to the felling of the dead fir trees. That was at the time they were felling them. I thought possibly they might save more than they did, and they claimed that for the time

they might spend in felling it where they might have saved it would be of greater expense than it would be worth to save it. Based on my experience in general as a cruiser, and more particularly on this investigation, I should say that I found places where the ground was very good logging conditions that they had done good work. There are places where they had fallen trees that might have been saved. I made an investigation of this tract with reference to determining the manner of the work that was done upon it. That was last week, the 11th, 12th and 13th. I was showing Mr. Collins, the Assistant Manager of the James D. Lacey Company over the ground, and we estimated some of the timber again; that is, the standing timber on the southwest of the southwest in Section 19. As to timber blown to the ground, there is that amount already stated on the southwest of the southwest and other places along the lines.

I have some general information as to how much timber is consumed as fuel with donkey engines, and would say from a thousand to twenty-five hundred feet a day. We did not make any estimate as to the amount of timber that could have been taken, including in that estimate what was probably used in donkey engines and for camp use. We did not make any detailed estimate. A conservative cruise of a cruiser, according to established practice, should be within ten per cent. of what may be taken off of the land by reasonably careful methods of logging. An estimate of thirteen thousand feet for a tree on the basis of a minimum measure of four feet eleven inches to a

maximum measure of nine feet ten inches as shown by the original cruise in this case is a conservative estimate. From the size of the stumps and the timber that was left on the ground I did not see how it could be that the estimate made by the cruisers would not hold, because while I did not go over the land as thoroughly as Mr. Collins did when he made the original estimate of the lands, still the smallest stump I saw there was four feet eleven inches, from that up to eight feet four inches. The photograph marked "Plaintiff's Exhibit 8" represents a fair average of the condition which we found on that recent investigation. I was with Mr. Collins when he took all of these photographs.

On CROSS-EXAMINATION by Mr. Kollock, of counsel for the defendants, the witness further testified as follows:

The greater part of these photographs were taken on the southwest quarter of Section 19. We took some on 29 as well and on other parts of 19. There were some taken on the southwest, probably half of these were taken on the southwest quarter of 19. I do not remember the measurements of the timber including green trees, logs, dead, breakage, including fir, spruce and cedar on the southwest quarter of Section 19. We estimated the standing trees last week, but we did not estimate the down timber. I took my figures that I had got the first time I was there of the standing timber, including the down that is all dead and down. The total I think was two hundred twenty-five thousand. I think Mr. Collins has an esti-

mate. I think the total cruise made by Horatio J. Brown, which shows on the southwest quarter of 19, green trees left standing, logs, dead, standing and down, and breakage, 538,000 as against the total of 1,214,000 feet for such items on the entire cut over tract, is practically correct. I base my opinion that the cruise should have held out upon an estimate taken practically from the size of the stumps. These were good large size trees, and many of them were matured fully as all fir of that size is. No question but what some of the trees were a thousand years old. A large tree that we estimated was 130 inches in diameter. We knocked off about 18 inches for bark. That would leave 112 inches diameter. There is no question but what that tree, if you could fell it without any breakage, would be 144 feet in length. Instead of that we only allowed 112 and we gave it an estimate of forty thousand feet. There is no question but what that tree would have scaled over sixty thousand feet. We took into account the age of that tree in making this estimate.

On RE-DIRECT EXAMINATION the witness further testified as follows:

This letter dated April 30, 1913, addressed to James D. Lacey & Company, relates to the first trip that I had made down to the lands.

Thereupon said letter was offered and admitted in evidence and marked "Complainant's Exhibit No. 10."

H. G. PLATT was called as a witness on behalf of the complainant, and in answer to interrogatories

propounded by Mr. Montgomery of counsel for complainants, testified as follows:

At all times since the consummation of the transaction involved in this case and the execution and delivery of this agreement of indemnity to Mr. Bell I have been ready, able and willing to indemnify Mr. Bell against any claim on this property. No claim has ever been made to me, either by Mr. Bell or by his attorney, Mr. Kollock. I have procured a deed to protect Mr. Bell on that property. I mentioned that fact to Mr. Kollock in a conversation on the day I procured it. The purpose of giving him that agreement was in order to leave Mrs. Morley out of any difficulty there was relating to this land. This agreement was substituted in place of it. That was my understanding of it, and I also supposed that it was their understanding of it.

On CROSS-EXAMINATION by Mr. Kollock of counsel for defendants, the witness further testified as follows:

We got the title to this property last September, I think it was. The title runs to me individually. I do not know whether I have ever served any notice that I was ready to convey that property to R. C. Bell. I would say I served formal notice. Of course, I advised you of it at the time and supposed you understood my purpose in obtaining the deed was to protect the grantor and of course to protect Mr. Bell. I cannot fix the date when I told you about it. My recollection is that it was in the course of a conversation. My recollection is perfectly clear on that except as to the time.

Mr. R. T. Platt might have told you about it over the telephone. I was negotiating for the sale at the time. I never was confident that the property was not right, but did not want the question to be raised. As to whether they had some actual notice of the transaction I have nothing to go on except my impression. I had an impression that these parties had actual knowledge of the timber contract outstanding. Things were said to me and to other people, and I do not know whether they knew anything about it or not. I did not want the question to come up, therefore I got the deed and paid for it. In reference to the two dollars per thousand as the price which Mr. Bell was to pay for the tract, my impression is I got the stumpage figures from the office of Lacey & Company, and where I got the price from I don't know. Might have got it from you. My recollection is that it was for \$2.50. It made no difference, however, because our liabilities on the indemnity I considered unlimited in amount, so I did not figure the \$2.50 made any difference and was simply a recital.

On RE-DIRECT examination the witness further testified as follows:

In referring to the fact that I thought the parties had notice, I meant that I thought they had notice of the recording of this deed in miscellaneous records so no claim could be raised about it, but I could not have anything definite to go on.

J. P. VAN ARSDALE was called as a witness on behalf of the complainants, and in answer to in-

terrogatories propounded by Mr. Montgomery of counsel for complainants, testified as follows:

I am a logging operator and have been in the timber business for about twelve years. At present I have charge of the logging operations of the Portland Lumber Company and the Coast Range Lumber Company and general manager of the Cathlamet Lumber Company. I made an examination of the tract of timber involved in this suit, known as the Grays River tract, with reference to ascertaining or forming an opinion as to the methods of logging conducted by Mr. Bell. I made an examination last Saturday, the 13th of this month. Mr. King, Mr. Collins and myself went over the lower end of Mr. Bell's road up through Section 24, intersecting the west line of 19 where Myers Creek and the railroad cross that section line. We followed the section line from there up to the southwest corner of Section 19, and before we reached the southwest corner of Section 19 we examined some timber which had been felled and bucked in the head of the draw near the center or west of the center of the southwest of the southwest of 19. By "bucked" I mean that the timber is sawed into logs after it is felled on the ground, sawed into proper lengths. Then we proceeded into the extreme southwest corner of the southwest of the southwest of 19, and I checked up Mr. King's and Mr. Collins' estimate of the standing timber on about 15 acres of land. In that corner the standing timber, both standing and green timber and dead down and dead standing timber was about two hundred fifty thousand feet. This is on the southwest of the south-

west. That was the green timber that had not been felled. We then proceeded up on a line between sections 19 and 30. Along this line we found considerable cedar and spruce and fir that had been felled and not removed. Some of it was bucked and some of it just had been felled. About two tallies, 660 feet, was on the quarter corner between 19 and 30. We proceeded in a northerly direction, crossing the canyon up on the ridge where there had been quite a pile of fir timber. We measured quite a number of stumps on this ridge and proceeded on down into the southeast quarter of the southeast of 19 near the center where we examined some timber that had been felled and bucked and not removed. From this point, continuing on down through the east half of the southeast quarter of 19 to the railroad and Myers creek, and followed the Cambell Lumber Company's logging road from there up into section 20. From the railroad we proceeded up in a northeasterly direction through the southwest of the southwest of 20 and in here we found an area of probably ten acres that was very well logged. The timber had been removed in a workmanlike manner; the felling was good and the ground was cleaned up in good shape. Proceeded east into the northwest quarter of the southwest quarter of 20 and then into the head of the canyon. We found at least 80,000 feet of fine timber that had been left. Followed the quarter down which the logging operation was being carried on to the railroad line, and followed the railroad line, making observations on each side down to the west side of the holdings. Based

upon my experience in the lumber and logging industry, and more particularly upon the investigation of this tract, I have this to say as to the logging methods used on this land; there seemed to be a piece of several acres where the workmanship was good. Again, we ran into ten or twelve acres where it was very poor. It looked as though the work changed hands; that an efficient man was in charge of it up through a period and then an inefficient man. Along the south line of 19 in the southwest quarter we noticed a strip of cedar that was simply felled over into the canyon on the side hill or smashed up. It was a good run of Pacific coast cedar. In the early part of 1911 the cedar market was slack. The latter part of 1911 it was poor. 1912 and 1913 the cedar market was good. As a matter of fact it was easier for us to dispose of cedar than any other product we had.

In the early summer of 1911 I had for some time been interested in the introduction of fuel oil into our logging camps and I made some experiments with fuel oil, also started to make some investigation as to the amount of timber a donkey would burn in an average day's work throughout the season. As a result of these operations I found that the range was from fifteen hundred to twenty-five hundred feet. We have had records where it ran as high as three thousand feet. Based on my knowledge of the amount consumed by donkey engines and the amount generally consumed in camps, and the amount of timber I found remaining on this tract as the result of improper logging I made a general total. I figured conserva-

tively that what was burned in donkey engines throughout the construction period and around camps, and what was left on the ground, that it would amount to three million five hundred thousand feet. This photograph marked "Plaintiff's Exhibit 8" represents some cedar I saw. This photograph is a picture of a couple of spruce trees that I saw on the southwest of of 19. I would consider these photographs a fair general average of the observations we made. From what I saw I did not get the impression that practical logging had been done. The felling and bucking may have been left to the fallers and buckers. Could find but very little indication of where wedges had been used in falling the timber. There had been no apparent effort to save certain of the timber. I consider that the work of a cruiser who comes within ten per cent of the actual amount of the timber produced to be very satisfactory work. I know of a case, stating an actual case that during the year 1911—during the year 1910 I made some surveys covering an area that had been logged during that year. We found the timber had fallen down 18 per cent, due to defective felling and bucking and poor workmanship. The Portland Lumber Company, which I represent, have logged our tracts in the vicinity of this Grays River tract. They were practically identical and the general grade of the timber is the same. I have known Mr. Brown since the fall of 1908. He has the reputation of being a good cruiser, a conservative cruiser. As a logger I know that his knowledge would be superficial. He never had charge of logging operations.

I will explain what I mean by the use of wedges. In this large timber in the west we have to contend with a rough broken ground, we have found by observation that very few trees are straight, and while they are not straight they lean in one direction and the tree can be felled in three directions; that is, it can be felled at right angles or the way it leans or between these points. Each gives advantage for the use of wedges to raise it. I was impressed of the small amount of wedging by the appearance of the stumps on the tracts in suit. Bedding means when they are felling large trees across a depression—in advance of that they fell small trees on the ground where the big tree is going to fall. I could not see any bedding on this tract. The effect of bedding keeps the trees from breaking when they hit the ground.

On CROSS-EXAMINATION by Mr. Kollock, counsel for the defendants, the witness further testified as follows:

I specified in the picture of the standing green trees that that was only timber in the southwest quarter of 19. I recollect three photographs of the standing and another picture of the down timber taken in the southwest of the southwest of 19. I think there were a couple of cedar trees and a spruce tree or two throughout the rest of the tract. To all intents and purposes the green timber is found on that same southwest of the southwest of 19. Our timber operations are very large and more desirable logging than the tract in suit, but when we first started in to work and for some

time it was somewhat similar to that of Mr. Bell's; it was broken ground. I do not consider the tract in suit good logging show for the main average of our tracts, but we have considerable land. Our fir is the same kind of fir as on Mr. Bell's land. It is practically the same growth of timber. On the southeast corner of our tract in 25 in the same township and range we have some young timber, haven't reached that yet. I do not know the amount of cedar that was on the entire tract involved in this suit. Most of the cedar was in southwest corner of 19. I have no actual knowledge of the cost of Mr. Bell's operation relative to the consumption of wood for fuel. My testimony is based on my general knowledge in the matter. Two of our camps have oil equipment. Poulson's have oil in their camps, also Hamlin Lumber Company. We did our experimental work in the summer of 1911 and in the fall. Clark Wilson Logging Company installed oil in their donkeys and in the spring of 1912 we installed oil, and have been using it since in all except the Cathlamet camp. The first introduction of oil as fuel in that territory was our own experiment which led to the installation of oil as a fuel. I did not make an aggregate complete estimate of the green trees and logs cut and bucked or the standing and down dead trees and the avoidable breakage on the southwest quarter of section 19. I went through the southwest quarter as I have outlined on my trip through there. I estimated the timber that had been in this strip and went into the canyon lower along the west line where apparently most of the timber left was there.

The amount of 538,000 feet that Mr. Horatio Brown said he found on the southwest of the southwest is approximately correct. Mr. Brown would be absolutely honest in his estimation of what was on there, and whether his judgment would be good as to what should be taken out or not I question it. I would not question his ability or honesty but would question his judgment as to what should be taken out. This would be from point of view of an actual logger. It would be based on the fact that he had not been engaged in the logging business.

On RE-DIRECT EXAMINATION the witness further testified as follows:

The reason for the installation of oil is that in the first place it was as a matter of economy to save our timber, because I found by experience that they used the best logs that we have in the woods, unless occasionally they get some that have three or four pitch rings. It kept them busy putting in enough fuel for the fires. I found on our operations that I could pay for the oil with the timber we used, the expense of logging it, etc., therefore we saved the labor, and the last reason for using it was for fire protection and the elimination of that risk. There was a saving, as I found in my operations, of one hundred per cent.

On RE-CROSS EXAMINATION, the witness further testified as follows:

I consider the three elements would be of equal importance.

At this point in the proceedings, counsel for the complainants and defendants stipulated in open

Court that the question of the amount of attorneys' fees should be left to the Court, and also stipulated that the ruling of the Court would be valid as to the question of attorneys' fee.

Thereupon complainants offered in evidence a letter dated at Portland, Oregon, April 30, 1913, from J. Frank King to James D. Lacey & Company, in reference to investigations made relative to the Grays River tract involved in this suit, which said letter was admitted in evidence and marked "Complainants' Exhibit No. 10," to the introduction of which exhibit defendants objected, on the ground that the same was incompetent, irrelevant and immaterial.

H. C. BELL was re-called as a witness on behalf of the defendants, and in answer to interrogatories propounded by Mr. Kollock of counsel for the defendants, testified as follows:

One of the foremen who had charge of the operations of the Morley tract was the same as one who had charge of the operations on the tract of land located immediately beside that. About 75% of the crew was the same, generally old-timers. Our general orders were not to use good timber for fuel, because there was much bad timber of that class of timber and plenty good enough for wood, and in this Grays River tract we had more wood than we needed, and there was no occasion to use good timber, therefore it was not used. I was on the ground personally every week, and I never observed a good log there at the dump. We hired an extra wood cutter to pack up the wood. It

took more sawing than it would if we had good clean stuff, and that is why we hired an extra man. That procedure held out through our entire operations. I do not think there was a million feet, or any amount that would have been merchantable logs used there as fuel. It was quite difficult to go to the southwest of the southwest of 19. There was not very much there, and this timber right adjacent to the forty acres was so that we could not take it, so we had to leave it. Too expensive to operate there. If we had been able to log timber on the southeast of the southeast of section 24 it might have been profitable to have handled timber on the southwest of the southwest of 19. It would need another engine for that. As a matter of business we did not consider it advisable to log the southwest of the southwest of 19. Our instructions to Brown & Brown were to make a complete report of everything that might have been taken out at all, to find out what was left that would have been merchantable. The cruise of James D. Lacey & Company was for three hundred thousand feet of cedar. That was the total they reported, three hundred thousand feet, of which we could sell one hundred sixty-five thousand. The shortage on the cedar under the cruise would be one hundred thirty-five thousand. For one lot of cedar which we sold with the fir we got as high as twelve dollars; the balance ranging at ten dollars. Our actual average logging expense, including all items of actual logging operations and rafting, but not including overhead expense and construction, ran between \$4.00 and \$4.50 a thousand. If all the cedar had been

taken out, as shown by the original cruise, the total amount would have been about \$450. We had good fallers and they used wedges, as all fallers do. The records show that there was a great deal of stuff that was broken. What was broken could not have been saved by wedges. Wedges were used. Lots of timber would have been too heavy to use wedges, and the defect in it would cause the tree to break before it could be held up. Those trees were very heavy. In our operations on timber we have bought we have operated by the same method and have handled our donkeys in the same manner that we did on this tract.

Q. What if the fact as to allowing for such timber as may have been used for fuel and the breakage and stuff in that case in the case the purchase had developed into an under run?

A. Over run.

Q. After taking into account timber that could be consumed for these purposes?

A. Yes, it was shown that we are not to use good logs, consequently we did not use them. But there was always an over-run anyway.

Now, within the time allowed by, the defendants present this, their Statement of the Evidence, and pray that the same be approved.

KOLLOCK & ZOLLINGER,

Attorneys for Defendants.

Due service of the within Statement of the Evidence is hereby admitted in Portland, Oregon, this 9th day of December, 1914, by receiving a copy thereof.

PLATT & PLATT,

Attorneys for Plaintiffs.

The above statement of the evidence having been duly served, lodged with the Clerk of this Court and present for settlement and approval within the time allowed by law, and being found to be true, complete and properly prepared, the same is now and hereby approved.

Done in open court this 12th day of January, 1915.

EDWARD E. CUSHMAN,
United States District Judge.

(Endorsed) :

“FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 10, 1914.

FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy.”

Stipulation (as to Summary of Argument of Counsel for Defendants).

It is hereby stipulated that the summary of the argument of counsel for defendants, and the oral findings and decision of the court, are substantially as follows, to-wit:

Summary of Argument of Counsel for Defendants.

At the close of the evidence, of counsel, for defendant, made the following statement in his argument to the Court on the law and facts involved in the case:

“We admit the execution of the note. We admit there is a certain balance due upon that note, and it is a fact as alleged in the complaint. We admit

we have not paid it. Unless we can show we are entitled by way of counterclaim, either by reason of the shortage in the timber, misrepresentation as to the amount of timber on the tract, or by reason of the failure or total inability of the complainant to convey what they purported to convey by the deed, or bargain of sale, which is in evidence, we must fail.

"Counsel submitted to the court last evening a brief to which reference was made in his early argument on the proposition as to the items which are essential in an action for deceit. I have no quarrel with that proposition of law. It is too well established; even for consideration, in an action at law for deceit that it is necessary to have not only the false statement but the knowledge that it was made with intent to deceive, and that at the time it was made the party making it knew it to be false or that it was made with such gross carelessness as to the truth as to be constructively fraudulent.

"Nor have I any quarrel with the statement that the same rule applies to a defense as against an action for the purchase money on the sale of personal property or land. I would say that we have not alleged here intentionally any actual fraud on the part of James D. Lacey & Company and cannot now charge any such fraud. We attempted to draw our pleadings and present the case as we thought the facts to be, neither the defendant nor myself, as his attorney, believed there was any actual fraud on the part of James D. Lacey & Company, particularly on the part of Mr. Langille, their representative and manager.

"It might be that a shortage of 25 per cent. from the figures given as the timber on the land would be false in an action at law for deceit or in the de-

fense to an action for the payment of purchase money, based on the same theory of such gross recklessness as to the true facts of the case. The law may then regard that, as a conclusion of law, as fraudulent.

“The testimony here shows, and I presume it is a matter of common knowledge, that no logger could operate on a shortage of 25 per cent or 20 per cent from the estimate on which he purchased the property and that a company with the reputation of James D. Lacey & Company, and their business, if it be true that their cut underruns 25 per cent or 20 per cent in this particular case would be chargeable with such gross disregard as to whether or not the facts are true which are stated, that it might be held as fraud in law, but I disclaim any intention to charge actual fraud, or actual intention to deceive on the part of that company.”

Court's Oral Findings (Decision).

“If I had any doubt about this proposition I should take the time to examine into the case, and these exhibits, but with the work I have on hand, with no such a doubt troubling the court, I shall decide the case now.

I find there was no representation of the fact made by Mr. Lacey on behalf of the plaintiffs in this case, regarding the amount of timber there was on this land. The only representation of fact made was that the cruise had been made of the land, timber on the lands, for the purpose of purchase when the Morleys acquired the lands; coupled with the expressed opinion, when asked how much it would over-run the cruise, that it would run as much as twelve million feet.

There being no direct and positive representation of fact as to the amount of timber on the land, the Court must go further and see what other things are involved in the case.

Counsel in his closing argument appeals to the standing of these people as cruisers. There was not any such confidential relation existing between the defendants Bell and the Lacey Company (James D. Lacey & Company), as to warrant Bell in placing any particular reliance on the expression of their opinion as he would upon the opinion of somebody he had hired or his own agent.

There is no evidence to support a finding that the expression of belief was so reckless and grossly exaggerated as to warrant the court in finding there was actual intent to deceive.

Then we come to this cruise upon which he bases his opinion and the evidence in the case seems to indicate that it was made according to the accepted method of cruising by men who are unimpeached and who are experienced, and the court finds that there is nothing in the case to warrant the assumption that Mr. Langille was careless in expressing that opinion, let alone the court being able to find that it is clearly and satisfactorily established as asserted that there was fraud. A mere preponderance of the evidence is not sufficient where fraud is charged or something tantamount to fraud.

Now coming to the other features of the case, to the title. There are many questions involved in that, regarding implied and expressed covenants and the question whether the statutes of Oregon and

Washington should control, but the court is clearly of the opinion that when the bond was entered into by these people, either at the same time or subsequent to the giving of the deed—and it does not make any difference which—that that bond undertook to handle the situation because it was expected that the liability of the parties would be determined by the arrangement made with these two instruments; we have to consider these two transactions, the bond and the deed, as binding as one. It is perfectly plain what was in the minds of the parties. Both of them were anxious to trade. Mr. Bell did not want to wait. He was losing time, and the parties did not want to bind themselves absolutely on something they did not know whether they could make good in this deal. This bond was made in the alternative, that they would either make good that deal, or in the event they would not be able to do it they would necessarily indemnify Mr. Bell and his company.

Now under that arrangement there could not be any breach of this agreement until such time as he was actually ousted. These parties put him in possession of the land and he was not ousted.

The bond of indemnity was absolute. The defendants did not call upon the bondsmen to indemnify them; did not seem to make any question upon that or to ask for additional indemnity or any new bond.

The court is clear that the plaintiffs should recover and find as a reasonable attorneys' fee five

hundred dollars. Findings, decree and conclusions may be prepared and entered."

PLATT & PLATT,
Attorneys for Plaintiffs.
KOLLOCK & ZOLLINGER,
Attorneys for Defendants.

(Endorsed) :—

"FILED IN THE
U. S. DISTRICT COURT,
Western Dist. of Washington,
Southern Division,
JAN. 12, 1915.
FRANK L. CROSBY, Clerk.

By E. C. Ellington, Deputy."

Findings of Fact and Conclusions of Law.

This cause having come on for trial on the 15th day of June, 1912, complainants appearing by Mr. Hugh Montgomery of Platt & Platt, their solicitors of record, and defendants appearing by Mr. J. K. Kollock of Kollock & Zollinger, their solicitors of record, and the complainants having introduced evidence, both oral and written, and the defendants having introduced evidence, both oral and written, and the cause having been fully argued and submitted, and the court being now fully advised, makes the following Findings of Fact and draws therefrom the succeeding Conclusions of Laws:

I.

That at all times mentioned in the bill of complaint filed in the above entitled suit, complainants were and still are husband and wife, and both citi-

zens, residents and inhabitants of the state of Michigan, residing at Lapeer, in said state.

II.

That at all times mentioned in the bill of complaint herein filed in the above entitled suit, defendants were and still are husband and wife and both citizens, residents and inhabitants of the state of Oregon, residing in the city of Portland, said state.

III.

That this is a suit between citizens of different states, to-wit: between complainants, citizens, residents and inhabitants of the state of Michigan, and defendants, citizens, residents and inhabitants of the state of Oregon, and is a suit to foreclose a mortgage in favor of the complainants and executed and delivered to the complainants by the defendants upon real property within the Western District of Washington, Southern Division.

IV.

That on the 22nd day of April, 1912, the defendant R. C. Bell, for a valuable consideration, executed and delivered to complainants his promissory note in writing, of which the following, in words, letters, and figures, is substantially a copy, to-wit:

“\$5625.00. Portland, Oregon, April 22nd, 1912.

On or before twelve (12) months after date, I promise to pay to the order of Mary E. C. Morley and Fred Morley five thousand six hundred twenty-five dollars for value received, with interest from date, payable at maturity at the rate of six (6%) per cent per annum, until paid, principal and interest payable in U. S.

gold coin, at Lumbermen's National Bank of Portland, Oregon; and in case suit or action is instituted to collect this note or any portion thereof, I promise to pay such additional sum of money as the court may adjudge reasonable as attorney's fees in such suit or action.

(Sd.) R. C. BELL."

V.

That no part of said indebtedness has been paid, either principal or interest, except \$120.93 on account of interest thereon paid May 26th, 1913, and there is now due and owing thereon from the defendant R. C. Bell to the complainants the full sum of five thousand six hundred twenty-five (\$5625), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less a credit of \$120.93 on account of interest thereon paid May 26th, 1913.

VI.

That Five Hundred Dollars (\$500) is a reasonable sum to be allowed complainants as attorneys' fees in the above entitled suit.

VII.

That at the time of the execution of said note the defendants were the owners of the following described real property, and to secure the payment of said note, both principal and interest and attorneys' fees, the defendants executed and delivered to the complainants their indenture of mortgage, in writing, covering all of that certain real estate situate in Wahkiakum County, State of Washington, and described as follows, to-wit:

- (a) Lots two (2), three (3), and four (4), and the southeast quarter of the northwest quarter and the east half of the southwest quarter, and the southeast quarter of section nineteen (19); the west half of the southwest quarter of section twenty (20); and the northwest quarter of the northwest quarter of section twenty-nine (29); all in township ten (10) north, range seven (7) West of the Willamette Meridian;
- (b) Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of section twenty-four (24); in township ten (10) north, range eight (8) west of the Willamette Meridian, together with the right to remove said timber at any time within twenty (20) years from the eighth day of August, 1906, and together with the right to build, operate and maintain railroads, skid-roads, telephone lines, or other devices, over and across said described land and necessary or convenient to remove said timber therefrom.
- (c) Also that certain right of way conveyed by G. K. Durrah and Clara Durrah, his wife, under date of January 15th, 1912, for fifteen (15) years, in language following, to-wit:

‘A right of way twelve feet wide, over our land for a railroad, commencing about five hundred feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing.

We also grant a privilege of using the river bank as a rollway.'

- (d) Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date of January 15th, 1912, for ten (10) years, in language following, to-wit:

'A right of way for a railroad over our land, situated near Grays River, Washington, width of right of way over said ground fifteen feet. Work shall begin within sixty days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a road-bed through the hay field.'

- (c) Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date of January 16th, 1912, for ten (10) years, in language following, to-wit:

'A right of way for a logging railroad over the following described land, SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 19, T. 10, R. 7. Work to start within sixty days from date. Logging road to follow left hand side along foot hill.'

Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, which said indenture of mortgage was executed, witnessed and acknowledged so as to be entitled to record, and was thereafter and on the 27th day of July, 1912, duly recorded in the records of mortgages of Wahkiakum County, Washington, in Volume 1, page 88, where at all times since it has remained of record, wholly unsatisfied, except that all indebtedness therein described has

been paid except that sought to be recovered in this suit.

VIII.

That on or about the 7th day of July, 1913, the above entitled court issued a temporary restraining order restraining the defendants above named, and each of them, and each of their agents, servants, employes and representatives, from selling, conveying, incumbering or removing from the County of Wahkiakum, State of Washington, a million and a half (1,500,000) feet of saw logs which said defendant, R. C. Bell, had removed from the lands described in Paragraph VII. of these Findings of Fact and Conclusions of Law, and on the 7th day of July, 1913, the above entitled court made and entered an order requiring the defendants, and each of them, to show cause why an injunction should not be issued enjoining the above named defendants, and each of them, their agents, servants, employes and representatives, from selling, conveying, incumbering or removing from the County of Wahkiakum, State of Washington, said saw logs which had been removed by the defendant, R. C. Bell, from the real property described in Paragraph VII. of these Findings of Fact and Conclusions of Law, and on or about the 12th day of July, 1913, the complainants and defendants in the above entitled suit, acting through their respective solicitors of record, entered into a stipulation in writing wherein and whereby it was provided that the defendants might file in the above entitled court a bond in the sum of Seventy-five Hundred Dollars (\$7500) given

by R. C. Bell, defendant above named, as principal, and American Surety Company of New York, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New York, as surety, conditioned that in consideration of the release of the said saw logs from the inhibition of said temporary restraining order theretofore issued in the above entitled cause, the said principal and surety would abide by and pay or comply with any judgment and decree that might be entered in the above entitled suit in favor of the complainants and against the defendants, and that judgment and decree might be rendered likewise against the American Surety Company of New York as well as said defendants, and that the above entitled court should have jurisdiction in any decree that might be rendered in favor of the complainants and against the defendants, to include in said decree a judgment against the principal and surety on said bond, without the necessity of the complainants herein bringing action upon said bond in another proceeding, and in pursuance of said stipulation and on or about the 12th day of July, 1913, a bond was executed by the said defendant, R. C. Bell, as principal and the said American Surety Company of New York as surety, wherein and whereby it was provided as follows:

“WHEREAS, in consideration hereof a stipulation has been entered into by and between the said mortgagees, the complainants in said suit, and said mortgagors, the defendants in said suit, acting by their respective solicitors of

record, wherein and whereby in consideration of the modification of said temporary restraining order and an order of court thereon relieving said saw logs from the inhibition of said temporary restraining order, and the turning over of said saw logs to the defendants, the principal and surety herein agree to and with the complainants herein that in the event that a judgment and decree is entered in said suit in favor of the complainants and against the defendants, the said judgment shall be likewise rendered against the surety herein, as though it had been a party defendant to such suit and to the obligations sought to be enforced therein, it being the intent and purpose of this bond that the liability of said surety shall take the place of and be in lieu of said mortgaged property released from the inhibition of said temporary restraining order.

“The liability of the principal and surety hereunder shall continue until and including final judgment and decree in the said suit and satisfaction thereof.”

IX.

That at no time during the transactions involved in the above entitled suit and at no time prior to the consummation of the sale and transfer of the lands involved in the above entitled suit, or any portion thereof, from the complainants to the defendants, did the complainants or any person or persons acting for them or on their behalf, make any false representations as to the amount of timber upon the lands involved in this suit, or any portion thereof, or make any fraudulent representa-

tions of any character as to said lands or the amount of timber upon said lands.

X.

That the real property described in Paragraph VII. of these Findings of Fact and Conclusions of Law was conveyed by the complainants to the defendants by deed of conveyance on the 22nd day of April, 1912, and recorded in Volume I. of the Records of Deeds of Wahkiakum County, Washington, page 101, and that at the time of the execution and delivery of said deed of conveyance from the complainants to the defendants, and contemporaneously therewith, there was executed and delivered to the defendants an agreement of indemnity wherein and whereby it was agreed that Harrison G. Platt and Robert Treat Platt should either obtain a deed or deeds sufficient to convey to the defendant above named, R. C. Bell, the timber standing, growing, lying and being on the Southeast quarter of the Southeast quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section twenty-four (24), Township ten (10) North, Range eight (8) West of the Willamette Meridian, in Wahkiakum County, State of Washington, together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906, together with the right to build, operate and maintain roadways, skidways, telephone lines, or other devices over and across said described land and necessary or convenient to removing said timber therefrom, or else protect and save harmless the said R. C. Bell against any damages, charges or expenses which he might incur or suffer by reason

of cutting or removing said timber, which said agreement of indemnity was accepted by the defendants in lieu of any covenant of siesin or title in the deed of conveyance of said timber from said complainants to said defendants, and the said Harrison G. Platt and Robert Treat Platt have since the date of the execution and delivery of the deed of conveyance of said property from said complainants to said defendants, procured a deed perfecting the title to the real property described in this paragraph, for the benefit of the defendant, R. C. Bell, and that said defendants, or either of them, have not suffered any damages, charges, or expenses by reason of cutting or removing said timber, or attempting to cut or remove any of said timber, and should be estopped from alleging or attempting to allege, claiming or attempting to claim, recovering or attempting to recover any damages on account of any alleged defect in title to the said described real property.

XI.

That no suit or action is pending or has been brought by the complainants for the collection of said indebtedness, or any part thereof, and the amount involved in the above entitled suit exceeds the sum of Three Thousand Dollars (\$3000) exclusive of interest and costs.

Conclusions of Law.

I.

That by reason of the premises, the complainants are entitled to a judgment against the defendant R. C. Bell and American Surety Company

of New York, a corporation duly incorporated, organized, and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the laws of the United States and of the State of Washington, authorized to engage in the surety business in the State of Washington, and each of them, for the sum of Five Thousand Six Hundred Twenty-Five Dollars (\$5,625) with interest thereon at the contract rate of six per cent, per annum from April 22, 1912, less a credit of One Hundred Twenty and 93-100 Dollars (\$120.93) on account of interest paid May 26, 1913, and the further sum of Five Hundred Dollars (\$500) attorneys' fees, and their costs and disbursements herein incurred in the above entitled suit.

II.

That complainants are entitled to a decree of foreclosure foreclosing the defendants, and each of them, and all persons claiming or to claim by, through, or under them or either of them, of and from all right, title, and interest in and to said mortgaged real property described in said mortgage mentioned in Paragraph XII of these Findings of Fact and Conclusions of Law.

III.

That complainants are entitled to an order directing the sale of said real property described in Paragraph VII. of these Findings of Fact and Conclusions of Law, as upon execution at law,

which said order shall provide that the proceeds of the sale of said property shall be applied to the costs and expenses of such sale, to the costs and disbursements incurred by the complainants in this suit, to the payment of attorneys' fees allowed complainants by the court, and to the payment of the sum found to be due the complainants herein, Mary E. C. Morley and Fred Morley, her husband, on said note, and which said order shall allow the complainants to become purchasers thereof.

IV.

That if there be a deficiency arising from the sale of said mortgaged property, that judgment therefor shall be docketed against the defendant, R. C. Bell and against said American Surety Company of New York, and each of them.

Order (Dated June 27th, 1914).

Whereas, the Findings of Fact and Conclusions of Law and the Decree in the above entitled case were signed by the Court on the 22nd day of June, 1914, and the court being fully advised in the premises, it is now

ORDERED that said Findings of Fact and Conclusions of Law and said Decree in the above entitled case be amended to read as signed as of this date, to-wit: the 27th day of June, 1914.

Dated this 27th day of June, 1914.

EDWARD E. CUSHMAN, Judge.

(Endorsed) :—

"FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington
Southern Division,
JUNE 27 1914

FRANK L. CROSBY, Clerk.
By F. M. Harshberger, Deputy."

**Objections of Defendants to Findings of Fact and
Conclusions of Law.**

Come now the defendants and each of them by John K. Kollock, their attorney, and object and except to each of the proposed findings of fact and conclusions of law submitted by complainants, which are hereinafter mentioned and referred to, and move the court to strike out the same and to substitute in lieu thereof the findings of fact and conclusions of law hereinafter specified.

1. The defendants object and except to finding of fact numbered VIII., for the reason and on the ground that the same is not complete, is not founded on any evidence submitted by the plaintiff or defendant, and is not within the issues of this suit, and move the court to substitute therefor the following:

VIII.

That on or about the —— day of ——, 1913, the above entitled court issued a temporary restraining order, restraining the defendants above named and each of them and each of their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wah-

kiakum, State of Washington, 1,500,000 feet of sawlogs claimed to have been removed by the defendant R. C. Bell from the lands described in paragraph VII of these findings of fact and conclusions of law, and on the 7th day of July, 1913, the above entitled court made an order requiring the defendants and each of them to show cause why an injunction should not be issued enjoining the above named defendants and each of them, their agents, servants, employes and representatives from selling, conveying or removing from the County of Wahkiakum, State of Washington, said sawlogs, and on or about the — day of —, 1913, the complainants and defendants in the above entitled suit, acting through their respective solicitors of record, entered into a stipulation in writing, in words and figures substantially as follows, to-wit:

“WHEREAS, this is a suit to foreclose a mortgage upon real estate and interest in real estate, as described in the complaint, and upon sawlogs cut from timber on said real estate and interest therein; and

WHEREAS, heretofore and on the 7th day of July, 1913, the Honorable Judge of the above entitled court made and entered an order requiring the defendants and each of them, to show cause on the 14th day of July, 1913, at the hour of 10:00 o'clock in the forenoon, why an injunction order should not be issued herein, enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying, encumbering or removing from the County of Wahkiakum, in said district and division, one and

one-half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling, conveying, encumbering or removing from the said County of Wahkiakum, the said sawlogs, or any part thereof.

NOW THEREFORE, IT IS HEREBY STIPULATED by and between the complainants above named, acting by Messrs. Platt & Platt and J. O. Bailey, their solicitors of record, and defendants, acting by Messrs. Kollock & Zollinger, their solicitors of record, that upon the execution and filing in the above entitled court of a bond in the sum of seventy-five hundred (7500) dollars, signed by defendant R. C. Bell, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and compliance with the surety laws of the State of Washington and of the United States, authorized to act as surety in the State of Washington, as surety, conditioned that in consideration of the release of said sawlogs from the inhibition of said temporary restraining order, the said principal and surety will abide by and pay or comply with any judgment or decree that may be rendered in the above entitled suit in favor of the complainants and against the defendants, and that judgment and decree may be rendered likewise against said American Surety Com-

pany of New York as well as against the defendants, and that in such case, and such case only, an order may be entered herein releasing from said temporary restraining order the said sawlogs.

It is the purpose and intent of this stipulation that the said bond shall stand in the place and stead of said mortgaged property released, and that the above entitled court shall have jurisdiction in any decree that may be rendered in favor of the complainants and against the defendants to include in said decree a judgment against the principal and surety on said bond without the necessity of the complainants herein bringing action upon said bond in another proceeding. Nothing herein shall be construed as inhibiting any of the parties hereto from appealing from any decree rendered by the above entitled court to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and during the pendency of such an appeal and until the conclusion thereof, the said bond shall continue in full force and effect, and the same judgment and decree may be rendered against said principal and said surety in said appellate court, or upon any retrial of said cause in the above entitled court, in case said appellate court or this court shall decide the issues in this cause in favor of complainants and against defendants,"

And in pursuance of said stipulation and on or about the — day of —, 1913, a bond was executed by the defendant, R. C. Bell, as principal, and the said American Surety Com-

pany of New York, as surety, in words and figures substantially as follows:

*	*	*	*	*	*	*	*
	*	*	*	*	*	*	*
*	*	*	*	*	*	*	*
	*	*	*	*	*	*	*
*	*	*	*	*	*	*	*

Bond.

WHEREAS, R. C. Bell and Mary A. Bell, on the 22nd day of April, 1912, executed and delivered to Mary E. C. Morley and Fred Morley, her husband, their mortgage upon certain land and standing timber and interest in land in the County of Wahkiakum, State of Washington, which said mortgage was so executed and acknowledged as to be entitled to record, and was recorded on the 27th day of July, 1912, in the records of mortgages of Wahkiakum County, State of Washington, in Volume I., page 88, where at all times since it has remained of record and unsatisfied as to the indebtedness hereinafter referred to, and

WHEREAS said mortgagees have filed in the United States District Court for the Western District of Washington, Southern Division, a suit to foreclose said mortgage against the property therein described and certain timber cut therefrom and within the jurisdiction of said court, and

WHEREAS, heretofore and on the 7th day of July, 1913, the honorable Judge of the above entitled court made and entered an order requiring the defendants, and each of them, to show cause on the 14th day of July, 1913, at the hour of 10:00

o'clock in the forenoon, why an injunction order should not be issued therein, enjoining the defendants, and each of them, their agents, servants, employes and representatives from selling, conveying encumbering or removing from the County of Wahkiakum, in said district and division, one and one-half million feet of saw logs described in the complaint, and during the pendency of said order to show cause, the defendants, and each of them, and each of their agents, servants, employes and representatives in charge thereof, or any part thereof, be restrained from selling, conveying, encumbering or removing from the said County of Wahkiakum, the said sawlogs, or any part thereof,

NOW THEREFORE, R. C. Bell, one of the said defendants, as principal, and American Surety Company of New York, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of New York, for the purpose of engaging in the surety business, and by compliance with the laws of the United States and the State of Washington, authorized to engage in the surety business in the State of Washington, as surety, are held and firmly bound unto Mary E. C. Morley and Fred Morley, in the sum of seventy-five hundred dollars (\$7500).

The condition of this obligation is such that

WHEREAS, in consideration hereof a stipulation has been entered into by and between the said mortgagees, the complainants in said suit, and said mortgagors, the defendants in said suit, acting by their respective solicitors of record, wherein and

whereby in consideration of the modification of said temporary restraining order and an order of court thereon relieving said sawlogs from the inhibition of said temporary restraining order and the turning over of said sawlogs to the defendants, the principal and surety herein agree to and with the complainants herein that in the event that a judgment and decree is entered in said suit in favor of the complainants and against the defendants, the said judgment shall be likewise rendered against the surety herein, as though it had been a party defendant to such a suit and to the obligations sought to be enforced therein, it being the intent and purpose of this bond that the liability of said surety shall take the place of and be in lieu of said mortgaged property released from the inhibition of said temporary restraining order.

The liability of the principal and surety hereunder shall continue until and including final judgment and decree in the said suit and satisfaction thereof.

Nothing herein shall be construed as prohibiting either party to such suit from appealing the same to the United States Circuit Court of Appeals for the Ninth Circuit.

IN WITNESS WHEREOF, the principal above named has hereunto set his hand and seal, and the said surety has hereunto set its corporate name and seal by its proper officers thereunto duly authorized this 12th day of July, 1913.

(SEAL)

.....
AMERICAN SURETY COMPANY
OF NEW YORK.

By.....

By.....

2. Defendants object and except to finding of fact numbered IX. on the ground and for the reason that it is not sustained by the evidence in the above entitled suit and move the court to substitute therefor the following:

IX.

That the mortgage referred to and described in paragraph VII. of these findings of fact was executed and delivered by the defendants as part of the purchase price of the real property therein described, the same having been conveyed to the defendants by deed of complainants made, executed and delivered April 22, 1912, and recorded July 31, 1912, in Volume I. of the Record of Deeds of Wahkiakum County, Washington, at page 101; that the total consideration moving to the complainants was the sum of \$30,000, of which \$7000 was paid in cash and the balance in and by the execution and delivery of the mortgage described in paragraph VII. of these findings of fact and the promissory notes thereby secured; that in the negotiations antecedent to the sale by the complainants to the defendant, R. C. Bell, of said land and timber, James D. Lacey & Company of Portland, Multnomah County, Oregon, acted as the agents and representatives of the complainants, and as a matter of inducement to the purchase by defendant, R. C. Bell,

and to induce said defendant to purchase the same, said James D. Lacey & Company represented to the defendant, R. C. Bell, that there was on said property as shown by said cruise, exclusive of hemlock, 11,584,000 feet board measure of good and merchantable timber; that the defendant, R. C. Bell, accepted said representation as the representation of the owner of the property, believed the same and purchased the property and executed the promissory note and mortgage in reliance upon said representation, and would not have purchased said property nor executed said promissory note and mortgage if such representation had not been made and if he had not believed the same; that thereafter the defendant, R. C. Bell, proceeded to remove timber from the above described land by careful, workmanlike and lumberlike methods, and has kept accurate and complete record of all merchantable timber cut from said premises, and the total of said cut and the total amount of merchantable timber on said premises at the time of said sale was less than 8,000,000 feet, to-wit: 7,916,999 feet of merchantable fir, cedar and spruce and of all merchantable timber exclusive of hemlock; that the representatives of the complainants at the time of the sale of the land and timber described in the complaint made by and through their authorized representatives and agents, James D. Lacey & Company, were false, untrue and fraudulent and known by the said James D. Lacey & Company, acting as agent and representative of the complainants as owners of said property to be false and untrue; that the defendant, R. C.

Bell, has been damaged thereby in the sum of \$9,167.57.

3. The defendants object and except to finding of fact number X, for the reason that the same is not founded upon the evidence in the above entitled suit, and move the court to substitute therefor the following:

X.

“That there was included in the conveyance by the complainants to defendant, R. C. Bell, the following property:

All of the timber standing, growing, lying and being on the SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 24, Township 10 North of Range 8 West of Willamette Meridian, together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906; that said property was included in the purchase money mortgage described in paragraph VII. of these findings of fact; that neither at the time of execution of said deed nor at any time did the complainants have any right, title or interest in or to the property described in the preceding paragraph, nor any right to convey the same, nor did the said conveyance vest in said R. C. Bell any right, title or interest in or to said timber; that the defendant, R. C. Bell, has not been able to cut or remove any of the said timber by reason of such failure of title; that there is timber standing, growing, lying and being on said SE $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Section 24, Township 10 North of Range 8 West of Willamette Meridian, to the extent of 260,000 feet; that the defendant, R. C. Bell, has been injured and damaged by fail-

ure of the complainants to convey title to said timber in the sum of \$650; that the agreement of indemnity referred to and described in the amended reply of the complainants herein was executed as and is an additional security and indemnity to the defendants herein, and that the defendants are not estopped or barred by the execution or acceptance of said agreement from claiming damages in this suit against the complainants by reason of the execution and delivery of such agreement of indemnity.

4. The defendants object and except to all of the conclusions of law, and move the court to substitute therefor the following:

I.

That the defendant, R. C. Bell, is entitled to a decree that he have and recover of and from the defendants the sum of \$9167.57, less such sum as shall be found due upon the promissory note described in paragraph IV. of the findings of fact.

.....

Attorneys for Defendants.

"Filed in the U. S. District Court, Western District of Washington, Southern Division, June 25, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy."

Decree.

This case came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof,

IT WAS ORDERED ADJUDGED AND DECREED as follows, to-wit:

I.

That complainants have and recover of and from the defendant, R. C. Bell, and American Surety Company of New York, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New York for the purpose of engaging in the surety business, and by compliance with the laws of the United States and the State of Washington authorized to engage in the surety business in the State of Washington, and each of them, the sum of Five Thousand Six Hundred Twenty-five Dollars (\$5,625.00), with interest thereon at the contract rate of six per cent per annum from April 22, 1912, less a credit of One Hundred Twenty and 93-100 Dollars (\$120.93) on account of interest paid May 26, 1913, amounting, both principal and interest to Six Thousand Two Hundred Forty and 95-100 Dollars (\$6,240.95), and the further sum of Five Hundred Dollars (\$500.00) attorney's fees, and their costs and disbursements in this suit incurred, taxed and allowed at Two Hundred and Thirty-four and 40-100 Dollars (\$234.40), and that execution issue therefor.

II.

That that certain mortgage executed and delivered by R. C. Bell and Mary A. Bell, his wife, to Mary E. C. Morley and Fred Morley, her husband, bearing date the 22nd day of April, 1912, and recorded in Volume I., pages 88 to 90 inclusive of the Records of Mortgages of the County of Wahkiakum, State

of Washington, given to secure a note dated April 22, 1912, in the sum of Five Thousand Six Hundred and Twenty-five Dollars (5625), due on or before twelve months after date with interest at the rate of six per cent per annum, payable to Mary E. C. Morley and Fred Morley and signed by R. C. Bell, is a first lien on the following described real property; situated in Wahkiakum County, State of Washington:

- (a) Lots two (2), three (3) and four (4), and the southeast quarter of the northwest quarter, and the east half of the southwest quarter, and the southeast quarter of section nineteen (19); the west half of the southwest quarter of section twenty (20); and the northwest quarter of the northwest quarter of section twenty-nine (29); all in township ten (10) north, range seven (7) west of the Willamette Meridian;
- (b) Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of section twenty-four (24); in township ten (10) north, range eight (8) west of the Willamette Meridian; together with the right to remove said timber at any time within twenty (20) years from the eighth day of August, 1906, and together with the right to build, operate and maintain railroads, skid-roads, telephone lines, or other devices, over and across said described land and necessary or convenient to remove said timber therefrom.
- (c) Also that certain right of way conveyed by G. K. Durrah and Clara Durrah, his wife, under date of January 15th, 1912, for fifteen (15) years, in language following, to-wit:

"A right of way twelve feet wide, over our land for a railroad, commencing about five hundred feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing. We also grant the privilege of using the river bank as a roll way."

- (d) Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date of January 15th, 1912, for ten (10) years, in language following, to-wit:

"A right of way for a railroad over our land, situated near Grays River, Washington. Width of right of way over said ground fifteen feet. Work shall begin within sixty days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a road-bed through the hay field."

- (e) Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date of January 16th, 1912, for ten (10) years, in language following, to-wit:

"A right of way for a logging railroad over the following described land: SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of section 19, T. 10, R. 7. Work to start within sixty days from date. Logging road to follow left hand side along foot hill."

together with the tenements, hereditaments and appurtenances thereto belonging or in anywise ap-

pertaining; and that it be and the same is hereby foreclosed, and the whole of the real property therein described be sold as provided by law, and that the proceeds of such sale be applied:

1. To the costs and expenses of such sale;
2. To the costs and disbursements incurred by complainants in this suit;
3. To the payment of attorney's fees allowed complainants by the Court;
4. To the payment of the sum found to be due the complainants herein, Mary E. C. Morley and Fred Morley her husband, on said note.

III.

That the balance of the proceeds, if any, arising from such sale after the payment of the several sums of money hereinbefore specified in paragraph II. of this decree, be paid to the defendants, R. C. Bell and Mary A. Bell.

IV.

That if the proceeds arising from such sale be insufficient to pay the costs of said sale, the costs and disbursements of the complainants, and the attorney's fees allowed complainants by the Court, together with the amount of the principal and interest found to be due complainants on said note, the Clerk of the above entitled court is ordered to docket a judgment against said defendant, R. C. Bell, and American Surety Company of New York, a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of New York for the purpose of engaging in the surety business, and by compliance with the

laws of the United States and the State of Washington authorized to engage in the surety business in the State of Washington, and each of them, for such deficiency, and that execution issue therefor.

V.

That on the sale of said property all the right, title and interest that the defendants, R. C. Bell and Mary A. Bell, his wife, had in or to the same at the date of the execution of the aforesaid note and mortgage to the complainants, to-wit, April 22, 1912, or that they have subsequently acquired therein or thereto, be sold, and that said defendants and all persons claiming by, through, from or under them, be forever barred and foreclosed of and from any and all claims, liens, estate, right, title or interest, at law or in equity, in or to said property hereinbefore described or any part thereof.

VI.

That execution issue on the request of the said complainants, Mary E. C. Morley and Fred Morley, her husband, or either of them.

VII.

That at the sale of said real property the said Mary E. C. Morley and Fred Morley, her husband, or either of them, may become a bidder therefor, and may purchase the same if he be the highest bidder.

VIII.

That the United States Marshal for the Western District of Washington let the purchaser under

said execution sale into the possession of said real property and the whole thereof, so purchased.

Dated this 22nd day of June, 1914.

EDWARD E. CUSHMAN,
Judge.

“Filed in the U. S. District Court, Western District of Washington, Southern Division, June 22, 1914, FRANK L. CROSBY, Clerk; By F. M. Harshberger, Deputy.”

Petition for Appeal and Allowance.

The above named defendants, R. C. Bell and Mary A. Bell and American Surety Company of New York, a corporation, feeling themselves aggrieved by the decree entered in the above entitled Court and cause on the 27th day of June, 1914, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth and specified in the assignment of errors, which is filed herewith, and they pray that an appeal be allowed, and that citation issue, as provided by law, and that a transcript of the records and proceedings, upon which said decree was based, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

KOLLOCK & ZOLLINGER,
Solicitors for Defendants R. C. Bell and Mary A.
Bell and American Surety Company of New York.

**Order Granting Petition for Appeal and Fixing
Amount of Bond.**

The foregoing petition is hereby granted and the appeal is hereby allowed this 12th day of December, 1914, and the bond on appeal is hereby fixed at the sum of Five hundred dollars.

EDWARD E. CUSHMAN, Judge.

(Endorsed) :

“FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 10, 1914.

FRANK L. CROSBY, Clerk,
By E. C. Ellington, Deputy.”

Assignment of Errors.

Come now the defendants, R. C. Bell and Mary A. Bell and the American Surety Company of New York, a corporation, and say that in the decree herein made and entered there is manifest error, and file the following assignment of errors committed and happening in the said cause upon which they will rely in their appeal from said decree:

I.

The United States District Court for the Western District of Washington, Southern Division, erred in rendering and entering a decree herein in favor of the complainants and against the defendants and the American Surety Company of New York, a corporation.

II.

That the Court erred in overruling and denying

the defendants' objections and exceptions to plaintiffs' proposed findings of fact and conclusions of law, and the whole thereof.

III.

That the Court erred in refusing, overruling and denying the defendants' proposed findings of fact and conclusions of law tendered to the Court.

IV.

That the Court erred in refusing to sign and file as findings of the Court, the defendants' proposed findings of fact and conclusions of law.

V.

That the Court erred in signing and filing the plaintiffs' proposed findings of fact and conclusions of law over the objections and exceptions of the defendants.

VI.

That the Court erred in making, signing and filing its finding of fact No. VIII. for the reason that the same is not complete, is not founded on or supported by the evidence and is not within the issues of this suit.

VII.

That the Court erred in making, signing and filing its finding of fact No. IX. for the reason that the same is not sustaining or supported by the evidence.

VIII.

That the Court erred in making, signing and filing its finding of fact No. X. for the reason that the same is not founded on or supported by the evidence.

IX.

That the Court erred in making, signing and filing its conclusion of law No. I.

X.

That the Court erred in making, signing and filing its conclusion of law No. II.

XI.

That the Court erred in making, signing and filing its conclusion of law No. III.

XII.

That the Court erred in making, signing and filing its conclusion of law No. IV.

XIII.

That the Court erred in not making, signing and filing defendants' proposed findings of fact No. VIII.

XIV.

That the Court erred in not making, signing and filing defendants' proposed finding of fact No. IX.

XV.

That the Court erred in not making, signing and filing defendants' proposed finding of fact No. X.

XVI.

That the Court erred in not making, signing and filing defendants' proposed conclusion of law No. I.

XVII.

That the Court erred in not rendering and entering a decree herein in favor of the defendants and against the complainants.

WHEREFORE, said defendants, R. C. Bell and Mary A. Bell, and American Surety Company of New York, a corporation, pray that said decree of

said United States District Court for the Western District of Washington, Southern Division, be reversed and set aside and a decree and judgment entered herein in favor of said defendants, R. C. Bell and Mary A. Bell and against the complainants, Mary E. C. Morley and Fred Morley.

KOLLOCK & ZOLLINGER,
Solicitors for defendants and American Surety Company of New York.

(Endorsed) :

“FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 10, 1914.

FRANK L. CROSBY, Clerk,
By E. C. Ellington, Deputy.”

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS,
That we, R. C. Bell and Mary A. Bell, as principals, and the American Surety Company of New York, a surety, are held and firmly bound unto the above named Mary E. C. Morley and Fred Morley in the sum of Five Hundred Dollars (\$500.00), for the payment of which, well and truly to be made, we bind ourselves jointly and severally, and each of our heirs, executors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 11th day of December, 1914.

WHEREAS, the above named defendants and American Surety Company of New York have

prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse a decree rendered and entered in the above entitled cause in the United States District Court for the Western District of Washington, Southern Division, on the 27th day of June, 1914:

NOW, THEREFORE, the condition of this obligation is such that the above named defendants, R. C. Bell and Mary A. Bell, and American Surety Company of New York, shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them, if they fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and virtue.

R. C. BELL (Seal)

MARY A. BELL (Seal)

AMERICAN SURETY COMPANY of New York,
(Seal of Surety Co.)

By W. P. Lyons,

Resident Vice-President.

Attest: By W. A. King, Resident Ass't. Secretary.
W. A. KING, Agent.

Order Approving Bond.

The above and foregoing Cost Bond is hereby approved this 15th day of December, 1914.

EDWARD E. CUSHMAN,
United States District Judge.

(Endorsed) :

“FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
DEC. 15, 1914.

FRANK L. CROSBY, Clerk,
By F. M. Harshberger, Deputy.”

Stipulation (as to Original Exhibits).

It is hereby stipulated by and between the attorneys for the plaintiffs and defendants that the original exhibits, as introduced in evidence, may be transmitted to the Circuit Court of Appeals and incorporated in the record on appeal without printing, and when so certified shall have the same effect as if formally printed in the record, and they may be referred to by either party in briefs or on printed argument.

PLATT & PLATT,
Attorneys for Plaintiffs.
KOLLOCK & ZOLLINGER,
Attorneys for Defendants.

(Endorsed) :

“FILED IN THE
U. S. DISTRICT COURT
Western Dist. of Washington,
Southern Division,
JAN. 12, 1915.
FRANK L. CROSBY, Clerk,
By E. C. Ellington, Deputy.”

Clerk's Certificate.

UNITED STATES OF AMERICA, }
WESTERN } ss.
DISTRICT OF WASHINGTON. }

I, FRANK L. CROSBY, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the above entitled cause as the same appears of record and on file in my office in said district at Tacoma, and that the same is made pursuant to praecipe of counsel filed herein.

I further certify that I hereto attach and herewith transmit the original citation and original order extending time for filing record on appeal, also original exhibits.

I further certify that the following is a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by and on behalf of the appellants, for making record, certificates or return to the United States Circuit Court

154 *Mary A. C. Morley and Fred Morley vs.*

of Appeals for the Ninth Circuit, in the above entitled cause, to-wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 377 folios at 15c\$.56.55

Certificate of Clerk to transcript of record, 3 folios at 15c45

Seal to said certificate20

Statement of the cost of printing said transcript, collected and paid by attorneys for appellants161.00

(Seal) ATTEST my hand and the seal of the said Court, at Tacoma, in said district, this *17th* day of February, A. D. 1915.

FRANK L. CROSBY, Clerk.
By E. C. Ellington, Deputy Clerk.

In the Circuit Court of Appeals of the
United States

FOR THE NINTH CIRCUIT

R. C. BELL and MARY A. BELL,
Appellants-Defendants,

VS.

MARY E. C. MORLEY and FRED MORLEY,
Respondents-Plaintiffs.

MAY 3 - 1915
F. D. Amickton,
APPELLANTS' BRIEF *Clark*

KOLLOCK, ZOLLINGER & McDOWALL,
Attorneys and Solicitors for Appellants.

PLATT & PLATT, AND HUGH MONTGOMERY,
Attorneys and Solicitors for Respondents.

In the Circuit Court of Appeals of the
United States

FOR THE NINTH CIRCUIT

R. C. BELL and MARY A. BELL,
Appellants-Defendants,

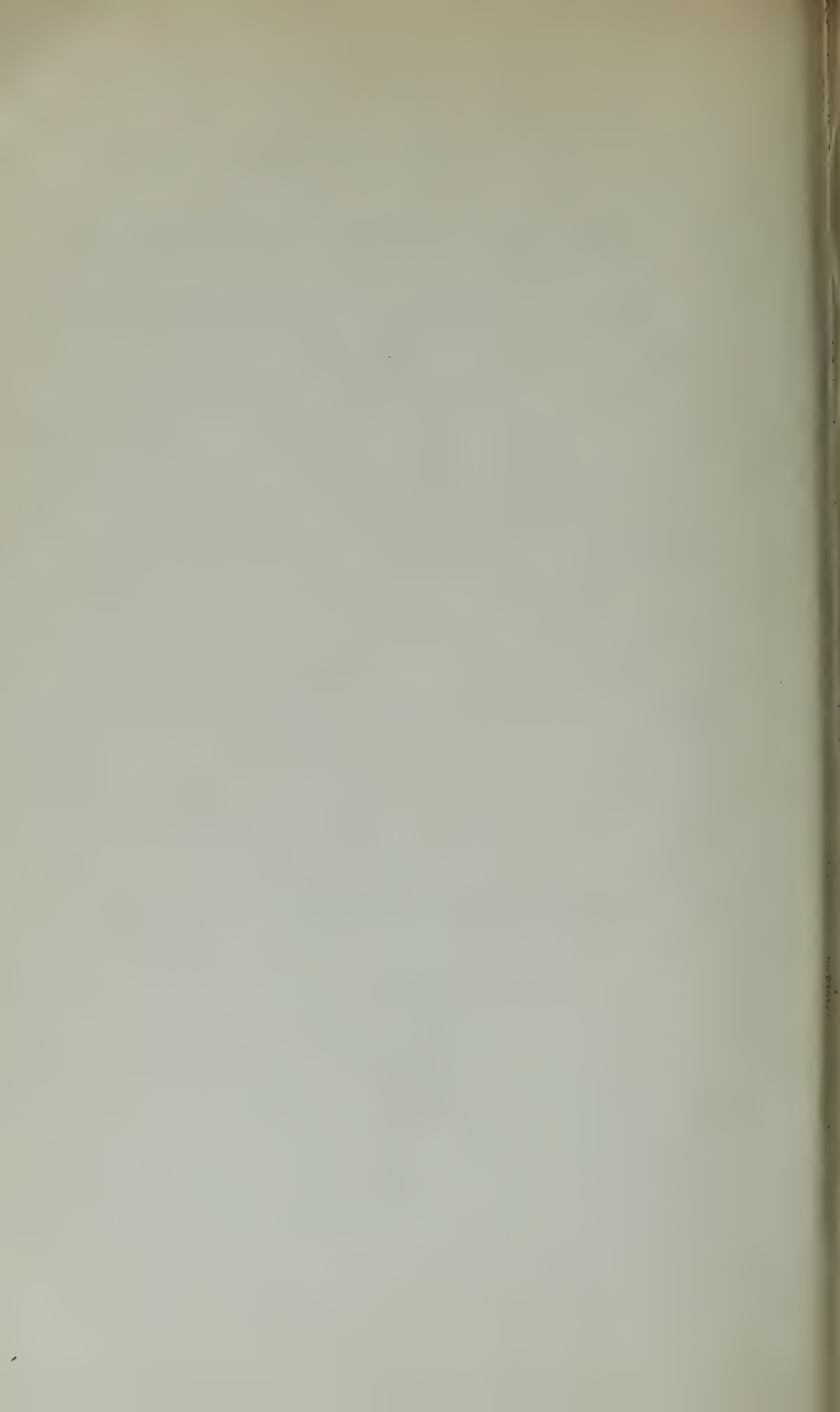
vs.

MARY E. C. MORLEY and FRED MORLEY,
Respondents-Plaintiffs.

APPELLANTS' BRIEF

KOLLOCK, ZOLLINGER & McDOWALL,
Attorneys and Solicitors for Appellants.

PLATT & PLATT, AND HUGH MONTGOMERY,
Attorneys and Solicitors for Respondents.



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In the Circuit Court of Appeals of the United States for the Ninth Circuit

R. C. BELL and MARY A. BELL,
Appellants-Defendants,

vs.

MARY E. C. MORLEY and FRED MORLEY,
Respondents-Plaintiffs.

APPELLANTS' BRIEF

STATEMENT OF FACTS.

In October, 1911, Mary E. C. Morley and Fred Morley claimed to be the owners of Lots 2, 3 and 4 and the southeast quarter of northwest quarter, and the east half of southwest quarter, and southeast quarter of Section 19; the west half of southwest quarter of Section 20; the northwest quarter of northwest quarter of Section 29, all in Township 10 North, Range 7 West, of Willamette Meridian, situate in Wahkiakum County, State of Washington.

Also all the timber standing, growing, lying and being on the southeast quarter of the southeast quarter of Section 24, in Township 10 North, Range

8 West of W. M., together with the right to remove said timber at any time within twenty years from the 8th day of August, 1906, and together with the right to build, operate and maintain railroads, skid-roads, telephone lines, or other devices, over and across said described land and necessary or convenient to remove said timber therefrom.

Also that certain right of way conveyed to G. K. Durrah and Clara Durrah, his wife, under date of January 15, 1912, for fifteen years, in language following, to-wit:

A right of way 12 feet wide, over our land for a railroad, commencing about 500 feet above the County Road on bank of Grays River, running from this starting point and curving until a straight line can be had along the fence; thence straight up the fence line, until the point of crossing the County Road into the lands of W. C. Kessell is reached, at which point a suitable curve will have to be made to make the County Road crossing. We also grant a privilege of using the river bank as a roll way.

Also a right of way granted by W. C. Kessell and Mary Kessell, his wife, under date January 15, 1913, for ten years, in language following, to-wit:

A right of way for a railroad over our land, situated near Grays River, Washington. Width of right of way over said ground 15 feet. Work

shall begin within 60 days from date of this lease. The grantee may go over any portion of the land desired, and agrees to remove any gravel that may be used for a roadbed through the hay field.

Also a right of way granted by Jacob W. Haynes and L. C. Haynes, his wife, under date January 16, 1912, for ten years, in language following, to-wit:

A right of way for a logging railroad over the following described land: Southwest quarter of northeast quarter of Section 19, Township 10, Range 7. Work to start within 60 days from date. Logging road to follow left hand side along foothill.

Together with the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, to have and to hold unto the parties of the second part, their heirs and assigns forever.

That on said property was considerable standing and lying timber of merchantable character; that defendant and appellant, R. C. Bell, is engaged in the logging business in the State of Washington, and as such his attention was attracted to the property above described by James D. Lacey & Company, well-known timber cruisers and estimators of Portland, Multnomah County, Oregon, acting as factors and brokers and as agents of Mary E. C. Morley and Fred Morley, the reputed owners of the property.

R. C. Bell, as shown by the uncontradicted testimony, was desirous of procuring this property for the purpose only of taking off the timber. Correspondence passed between James D. Lacey & Company and R. C. Bell, relative to the property above described, which finally terminated in H. D. Langille, as agent of James D. Lacey & Company, and R. C. Bell being brought together for the purpose of ascertaining the amount of timber on the premises. On or about April 22, 1912, the transaction was finally closed by R. C. Bell purchasing the timber from Mary E. C. Morley and Fred Morley through James D. Lacey & Company, for the sum of \$30,000.00, the purchase price of which was soon after paid with the exception of one note, executed April 22, 1912, signed by R. C. Bell, in the sum of \$5625.00, payable to Mary E. C. Morley and Fred Morley, twelve months after date, which note was secured by purchase money mortgage on the property above described. When the note became due, payment was demanded and R. C. Bell refused to make payment on the ground that the amount of timber on the premises had been misrepresented to him and had fallen far short of the represented cruise. The plaintiffs filed suit to foreclose the mortgage in the District Court of the United States for the Western District of Washington, Southern Division, and immediately after applied to the court for a restraining order restraining the defendants above named and each of them and their agents, servants, employes and representatives from selling, conveying, encumbering or removing

from the County of Wahkiakum, State of Washington, one and one-half million feet of sawlogs, which respondent claimed defendant, R. C. Bell, had removed from the lands above described contrary to the provisions of the mortgage; and on July 7, 1913, in the District Court of the United States for the Western District of Washington, Southern Division, made and entered an order requiring defendants and each of them to show cause why an injunction should not be issued enjoining the above defendants and each of them, their agents, servants, employes and representatives from selling, conveying and encumbering or removing from the County of Wahkiakum, State of Washington, the said one and one-half million feet of sawlogs.

That thereafter, the complainants and defendants, acting through their respective solicitors of record, entered into a stipulation in writing, wherein and whereby it was provided that defendants might file in the above entitled court bond in the sum of \$7500.00 given by R. C. Bell, defendant, as principal, and American Surety Company of New York, a corporation, as surety, conditioned that in consideration of the release of the said sawlogs from the said temporary restraining order theretofore issued, the said logs should be released and which logs afterwards were released; that thereafter the defendants filed an answer in said cause and reply having been filed by the complainants the case went to trial June 15, 1914, before

the District Court of the United States in and for the Western District of Washington before Hon. E. E. Cushman, judge of said court. After the case had been heard, the court made and entered a decree for the complainants and against the appellants.

The contention of the defendant in the lower court, the appellant herein, was that certain statements made by James D. Lacey & Company, as agent of Mary E. C. Morley and Fred Morley, were false and fraudulent as to the amount of timber on the premises, and were made with the intention to deceive the appellants herein, and that the deed executed by Mary E. C. Morley to the appellant herein conveyed no title in that no title was vested in Mary E. C. Morley and Fred Morley after the date of such conveyance to the appellant.

The Lower court found that at no time during the transaction involved in the above entitled suit and at no time prior to consummation of the sale and transfer of the lands involved in the above suit, or any portion thereof, from the complainants to the defendants, did the complainants or any person or persons acting for them or in their behalf, make any false representations as to the amount of timber on the lands involved in this title or any portion thereof, or make any fraudulent representation of any character as to said lands or the amount of timber thereon; also the lower court further found, that at the time of execution and delivery of deed

of conveyance from complainants to defendants, and contemporaneously therewith a certain indemnity agreement was entered into between Harrison G. Platt and Robert Treat Platt and the appellant herein, indemnifying him against any damage which said R. C. Bell might incur or suffer by reason of his cutting or removing said timber, due to the fact that the title in said premises did not vest in Mary E. C. Morley and Fred Morley, and from that decision this appeal has been perfected.

POINTS AND AUTHORITIES.

I.

Fraud.

1. In General: Fraud as a generic term, especially as the word is used in courts of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence justly imposed, and are injurious to another or by which an undue or unconscientious advantage is taken of another.

1 Storey, Equity, Sec. 187.

Conyers vs. Graham, 81 Ga. 615.

Crislip vs. Cain, 19 W. Va. 438.

2. Statement of Opinion: An expression of opinion may be so blended with statements of fact as to become itself a statement of fact.

20 Cyc. 18, 19.

Scholfield, Gear, etc. & Co. vs. Scholfield, 71 Conn 1; 40 Atl. 1046.

Marshall vs. Seelig, 49 N. Y. App. Div. 433; 63 N. Y. Sup. 355.

Gordon vs. Taylor, 105 U. S. 553.

Kilpatrick vs. Reeves, 121 Ind. 280.

Haight vs. Hoyt, 19 N. Y. 464.

Howard vs. Gould, 28 Vt. 728.

3. It is not always necessary that the speaker should actually know that his representation is false, and a reckless statement may amount to a fraudulent statement.

20 Cyc. 27.

McFerran vs. Taylor, 3 Cranch 270.

Smith vs. Richards, 13 Peters 26, 38.

Daniel vs. Mitchell, 1 Story 172.

Montreal River Lbr. Co. vs. Mihills, 80 Wis.

540.

Smith on The Law of Frauds, Sec. 49.

Watson vs. Jones, 41 Fla. 241.

4. Where there exists between the parties some relation whereby the purchaser, being ignorant of the facts, is justified in placing trust and confidence in the honesty and superior knowledge of the vendor, or where, in the absence of any particular relation, special confidence is placed in the vendor on account of his peculiar knowledge and the purchaser's igno-

rance, the rule of caveat emptor does not apply, and in such cases the purchaser may without further investigation rely on the vendor's statements even where they might otherwise be deemed expressions of opinion or dealer's talk.

20 Cyc. 60-61.

Watson vs. Molden, 79 Pac. 503, Idaho, 1905.

Nolte vs. Reichelan, 96 Ill. 425.

Pickard vs. McCormick, 11 Mich. 68.

McAiler vs. Horsey, 35 Mich. 439.

Bennett vs. Gibbons, 55 Conn. 450.

5. Where the expression relates to some specific, extrinsic fact, which materially affects the value, and such fact is within the vendor's knowledge; and where the statement is made with knowledge of its falsity or of what the law regards equivalent thereto and the fact is within the superior knowledge of the vendor, such statement amounts to fraud.

Watson vs. Jones, 41 Fla. 241.

Miner vs. Medbury, 6 Wis. 295.

20 Cyc. 59.

Oaks vs. Miller, 11 Colo. App. 374.

Henderson vs. Henshaw, 54 Fed. 320.

Shanks vs. Whitney, 66 Vt. 405.

Whiting vs. Price, 169 Mass. 576.

II.

The complainants herein had no title or right to convey the property.

1. A deed recorded in Miscellaneous Records is no notice to a subsequent purchaser in the absence of actual notice by such subsequent purchaser of the outstanding conveyance.

Richey vs. Griffith, et al., 1 Wash. 429.

Wade on The Law of Notice, 71.

III.

1. Deed: The substitution of the word "Grant," expressed in the deed, for the word "Convey," expressed by the statute, did not prevent said deed from being a substantial compliance with the statute.

Remington & Ballinger's Ann. Code & Stat., *Wash*

Vol 2, Sec. 8748.

Bargain and sale deeds for the conveyance of land may be substantially in the following form:

The grantor for and in consideration of
in hand paid, does bargain,
 sell and convey to.....
 the following described real estate, situate in
 the County of, State of
 Washington.

Dated this.....day of, 18....

Every deed in substance in the above form shall convey to the grantee, his heirs or other legal rep-

representatives an estate of inheritance in fee simple, and shall be adjudged an express covenant to the grantee, his heirs or other legal representatives, to-wit: That any grantor was seized of an indefeasible estate in fee simple free from encumbrance done or suffered from the grantor, except the rents and surplusage that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns, may in an action recover for breaches as if such covenant were expressly inserted.

Blood vs. Siebert, 38 Wash. 643.

American Savings Bank & Trust Co. vs. Helgeson, 64 Wash., 54-63.

Williams vs. Hewett, 57 Wash. 62.

West Coast Mfg. & Inv. Co. vs. West Coast Imp. Co., 25 Wash. 627.

Barlow vs. Delaney, 40 Fed. 97.

ARGUMENT.

The position of the appellants in the lower court and on this appeal is that in negotiations pertaining to the sale by complainants to the defendant of said land and timber, James D. Lacey & Company of Portland, Multnomah County, Oregon, acted as the agents and representatives of the complainants, and as a matter of inducement to the

purchase by defendant, R. C. Bell, and to induce said R. C. Bell to purchase the same, ~~and~~ James D. Lacey & Company represented to defendant, R. C. Bell, that there were on said property, as shown by their cruise, exclusive of hemlock, 12 million feet, board measure, of good and merchantable timber, and that defendant, R. C. Bell, accepted said representation as the representation of the owner of the property; believed the same, and purchased the property and executed the promissory note and mortgage in reliance on said representation, and would not have purchased said property nor executed said promissory note and mortgage if such representation had not been made, and if he had not believed the same.

That the representations of the complainants at the time of the sale of the land and timber described in the complaint made by and through their authorized representatives and agents, James D. Lacey & Company, were false and untrue and fraudulent, and known by the said James D. Lacey & Company acting as agents and representatives of the complainants as owners of said property to be false and fraudulent, and that on account of said false and fraudulent representations said R. C. Bell has been damaged.

That the complainants at the time they sold the property to R. C. Bell, which property was later included in the purchase money mortgage which is sought to be foreclosed by this action, nor at any

time, had ~~any~~ right, title or interest in or to the southeast quarter of southeast quarter of Section 24 in Township 10 North, Range 8 West, of Willamette Meridian, described in said mortgage to convey the same and that the conveyance by the plaintiffs to R. C. Bell did not place in R. C. Bell any right, title or interest in and to said timber.

There are certain underlying or obscure principles of law from the true deduction of which was constructed legal maxims which may be stated as independent propositions and which will admit of no modifications. One of these underlying principles of law is that fraud may consist of statements of opinion; reckless statements by a vendor; and may be shown to exist where confidential relations exist between vendor and vendee, or where the vendor has superior knowledge as to the facts represented to the vendee.

Even should the statement of Mr. Langille be taken as a mere expression of opinion, yet that expression of opinion amounted to fraud in that it was so blended with the statement of fact as to become itself a statement of fact. The line of demarcation between statement of existing fact and mere expression of opinion is sometimes very obscure; an expression of opinion being sometimes so closely linked to a statement of the existence of certain facts as to become a part of the latter.

In 20 Cyc. 27 we find the following statement:

It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge and he makes it recklessly without any knowledge of its truth or falsity and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent.

The rule just stated applies although the speaker honestly believes the fact he represents as existing actually does exist.

Concerning the manner in which a statement of opinion may amount to fraud, we call the attention of the court to the case of *McFerrin vs. Taylor* reported in 3 Cranch 270, where the court, speaking through Chief Justice Marshall, says:

He who sells property under description given by himself is bound to make good that description, and if it be untrue in a material point, although the variance be occasioned by a mistake, he must still be liable for that variance.

Again, in the case of *Smith vs. Richards*, 13 Peters 36-38, the court says:

The principles of this case (referring to *McFerrin vs. Taylor* and other cases) we consider founded on sound morals and law. They

rest upon the ground that the party selling property must be presumed to know whether the representations which he makes are true or false. If he knows it to be false, that is fraud of a positive kind, but if he does not know it, then it can only be very gross negligence, and in contemplation of a court of equity representations founded on mistake resulting from such negligence is fraud.

Again, in the case of *Daniel vs. Mitchell*, 1 Story 172, is stated:

Nothing is more clear in equity than the doctrine that a bargain founded on a mutual mistake of the facts constituting the very basis or essence of the contract, or founded upon the representations of the seller, material to the bargain and constituting the essence thereof, although made by innocent mistake as well as fraud in any representation of fact material to the contract, furnishes a sufficient ground to set it aside and declare it a nullity.

The position of complainants in the lower court was that the statement of Lacey & Company that the timber would cruise 12 million feet was a mere expression of opinion and did not amount to a positive statement such as would render plaintiffs liable in an action of fraud, but R. C. Bell stated to Mr. Langille that he could not and he would not purchase the property for \$30,000.00 unless he were

sure that it would cruise 12 million feet. He made this statement: "If you tell me it will cruise 12 million feet I will give you \$30,000.00," clearly indicating that whatever statement would be made by Mr. Langille would be relied upon by Mr. Bell, thus requiring more than a mere expression of opinion, and a positive statement of fact as an answer. Mr. Langille said: "I think it will cruise 12 million feet." He knew that his answer would be relied upon by Mr. Bell, and if it was a mere statement of opinion, it was a statement of a material fact which he knew would be relied upon, and which was wholly relied upon by Mr. Bell, and such statement of an opinion amounted to a misrepresentation in that it was concerning some specific, extrinsic fact which materially affected the value, and in such cases the rule is that if it is peculiarly within the knowledge of the vendor and the statement is made with knowledge of its falsity, or what the law regards as equivalent thereto, and with the intent that the purchaser should act in reliance thereon, which he does to his injury, the representation is actionable. This is the rule laid down in 20 Cyc. 59, whether fraud may consist in passing of an opinion or belief in the guise of positive knowledge, the speaker is not relieved from liability, although in making the assertion he relies upon outside information.

The opinion of Mr. Langille, even though it be termed an opinion, was given in the guise of positive knowledge, as he knew that Mr. Bell would

not buy the property unless it would cruise 12 million feet, and when he stated he thought it would cruise 12 million feet, such statement when proven to be untrue amounted to fraud.

In the case of Howard vs. Gould, 28 Vt. 728, the court says:

To constitute fraud it is not necessary that a material fact should be directly misrepresented intentionally, but if a false impression is produced by words or acts in order to mislead and obtain an undue advantage, it should be regarded as fraud.

Applying the above principles relative to reckless statements made by the vendor to facts in this case we see that Lacey & Company, according to their own testimony, had made a cruise of the timber on the premises and stated to Mr. Bell, upon his inquiry as to the amount of timber on the premises, that the cruise showed 11,584,000 feet, board measure, of good merchantable timber. The testimony shows that the actual amount of timber upon the premises was 7,916,999 feet. There is such a variance between the statement of Mr. Langille as to the amount of timber on the premises as to show that his statement was either made with the intention to defraud and he knew the same to be false, or was a statement recklessly made without any knowledge as to the actual amount of timber on the premises, either of which constitutes fraud. If

he did not actually cruise the timber himself but relied upon the cruisers of James D. Lacey & Company or upon anyone else, the statement was still fraudulent if untrue, for the weight of authority is that where one relies upon the statements of another and makes a positive statement, which positive statement was made by Mr. Langille, that the timber cruise was 11,584,000 feet, such statement is nevertheless fraudulent on the theory that statements recklessly made are fraudulent.

In the case of *Watson vs. Moulden*, 79 Pac. 503; 10 Ida.570, where one party stated to another that certain things pertaining to the sale of shares of stock in a Canal Company are true, also facts pertaining to the sale of his interest in certain lands are true, and is informed by the vendee that the said vendee will rely upon statements and purchase shares of stock, wholly relying upon the statements of the vendor and such statements were afterwards found to be false and resulted in inducing the vendee to purchase, the court held that the vendor must respond in damages for his false and fraudulent statements on the ground that a confidential relation existed between the vendor and the vendee concerning the information which was entirely within the knowledge of the vendor.

The court in the above case uses this language:

By the very well-known weight of authority, ordinary prudence and diligence generally re-

quire a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they could be acted upon, if the facts are peculiarly within the other party's knowledge though they are not exclusively so, and though the party to whom the representations are made may have the opportunity to ascertain the truth for himself.

The court further says:

It is difficult to establish a fixed rule for the governing of cases of this character. It is seldom two cases are found with the same state of facts existing, and the rule seems to be that each case is dependent upon its own particular facts, bearing in mind at all times that the law does not countenance fraudulent statements or misrepresentations made for the purpose of deceiving an intending purchaser; if such facts are shown by the record to exist the courts will refuse to grant him relief for his wrongful acts.

Applying the principle of law laid down in the above case to the case at bar, we find that the statement of R. C. Bell to H. D. Langille, that he would not purchase the property unless it would cruise 12 million feet of lumber, together with the statement of H. D. Langille that he thought it would cruise 12 million feet, shows a confidential relation existing between the complainants and de-

fendants in that James D. Lacey & Company, the agents of defendants and cruisers of timber, had cruised the timber, and the information as to the amount of timber on the property was within their knowledge and theirs alone, and when Mr. Langille, in answer to Mr. Bell's statement, possessing the knowledge as to the amount of timber on the property as he did, made the statement that he thought it would cruise 12 million feet, he made such statement in view of the existence of a confidential relation, and such statement if proven untrue constitutes fraud. Mr. Bell had a right to rely upon the statement of Mr. Langille, as agent of Lacey & Company, for the reason that they were cruisers of good standing in Portland and vicinity and reputed to be very careful cruisers and could be relied upon.

In *Pickard vs. McCormick*, *supra*, the court says:

Where a purchaser, without negligence, has been induced by the arts of a cheating seller to rely upon statements which are knowingly false, and is thereby damaged, it can make no difference in what respect he has been deceived if deceit was material and relied on.

Where, as in this case, the confidential relation was shown to exist, it is the duty of the vendor or the party in whom the confidence is reposed, to be sure that the statement he makes as to the quantity, quality or any other material matter in the transac-

on, is correct, and this is especially true where the vendor knows that the vendee relies upon the statement which he has made or is about to make. For where the parties are not yielding on equal terms, as the facts show in the case at bar, for the reason that James D. Lacey & Company had already cruised the timber, and the seller having superior means of knowledge gives a false opinion or makes a false statement as to material facts for the purpose of defrauding the purchaser, and the latter has reason to rely and does rely on its truth, an action will lie. R. C. Bell was justified in placing trust and confidence in the honesty and superior knowledge of James D. Lacey & Company, a firm of good standing in the cruising business, especially in view of the fact that the ~~confidence~~ ^{reputation} shows that the reputation of James D. Lacey & Company was that they were most conservative cruisers, and in such cases the purchaser may without further investigation rely on the vendor's statements and this would be especially true of the case at bar in that Mr. Bell stated to Mr. Langille, the agent of James D. Lacey & Company, that he relied on the statements made by said Langille, and there can be no question but that this fact was brought home to Mr. Langille in that he testified that he knew Mr. Bell was relying on his opinion.

Fraud may be proven where facts are peculiarly within the knowledge of the vendor and are misrepresented. 20 Cyc 59, where we find the following statement:

Although statements of the value of property are ordinarily considered as mere expression of opinion and are therefore not actionable, the rule is otherwise where the misrepresentation relates to some specific, extrinsic fact which materially affects the value, and in such cases if the fact is peculiarly within the knowledge of the vendor and the statement is made with knowledge of its falsity or what the law terms the equivalent of falsity, with the intent that the purchaser should act on such statement, and the purchaser does act on such statement to his damage, such conduct amounts to fraud on the ground that the facts stated are within the superior knowledge of the party making the statement.

Now, coming to the question of title. The evidence shows the title to the property above described to be satisfactory with the exception of the southeast quarter of southeast quarter of Section 24. The abstract furnished by the complainant at the time the property was purchased shows a conveyance from Christopher William Whitford and wife to Ernest Strong, purporting to convey the timber upon the said southeast quarter of southeast quarter of Section 24, to said Ernest Strong, which instrument was recorded August 14, 1906, in the office of the County Recorder of Wahkiakum County, Washington, in Book A of Miscellaneous Records. A subsequent conveyance was made by Strong, the grantee in that deed from Whitford and

wife, which subsequent conveyance purported to vest the title of Ernest Strong in Mrs. Morley. Subsequently, however, the grantor in that deed, by a more or less extended series of conveyances, and prior to the date on which Mary E. C. Morley and Fred Morley conveyed to appellant, R. C. Bell, conveyed the land to other parties, some of whom appeared by the form of the conveyance which was subsequently shown, to be residents of New Mexico. The contention of appellant in the lower court and in this court and in the appellate court is that the conveyance from Christopher William Whitford and wife to Ernest Strong, which was recorded in Book A of Miscellaneous Records, was not sufficient to convey the title to the property to Ernest Strong in that it was recorded in the Miscellaneous Records and was no notice, constructive or otherwise, to a subsequent purchaser of the land unless he could show actual knowledge in and of the fact that this instrument which was recorded in Miscellaneous Records was outstanding, and that the Miscellaneous Records are not a part of the legal records of the state and are not recognized by statute or otherwise but are merely a scrap book for the purpose of preserving evidence until actual knowledge could be shown; that therefore the conveyance from Whitford and wife to the parties in New Mexico, subsequent to the date on which they conveyed to Ernest Strong, through which Mrs. Morley derived title, vested the title to the property in the parties in New Mexico irrespective of the prior deed to the purchasers of Mary E. C. Morley,

in that the parties in New Mexico had no notice, constructive or otherwise, of the title being in anyone else than Christopher William Whitford and wife, their grantors.

In the case of Richey vs. Griffith, et al., 1 Wash. 429, we find:

Under the registry laws of this state the depositing of the deed for record in the office of the County Auditor does not operate as constructive notice to the party. It is necessary that the deed be recorded in the **proper record** and properly indexed, the index being an essential part of the record.

In Wade on Law of Notice, page 71, we find:

Conveyances not properly recorded are held void as against a subsequent bona fide purchaser or encumbrancer for a valuable consideration whose deed is first filed for record.

The latter principle is a principle of elementary law.

That the conveyance by Christopher William Whitford and wife to the parties in New Mexico, which conveyance was subsequent to the conveyance to Mary E. C. Morley's predecessor, was an assertion of the rights of Whitford and wife in and to the property over the right of the predecessors

of Mrs. Morley to the property in that any subsequent conveyance is an attempt to assert some right in and to the property conveyed. The deed from Mary E. C. Morley and Fred Morley to R. C. Bell was a bargain and sale deed for the conveyance of the property in that it conformed substantially to the statute.

In the case of *Blood vs. Siletz*, 38 Wash. 643, the complaint alleged that respondent, by his deed of that date, in consideration of \$735.00, sold and conveyed to appellant all of the merchantable timber then standing or lying on certain described real estate; that on May 9, 1903, Snohomish Land Company, a corporation, commenced an action in the Superior Court of Snohomish County against appellant and others to quiet title to the property; that afterwards in said action appellant was by order of said court perpetually enjoined from entering said land or from cutting or removing any timber therefrom, and was damaged in the sum of \$735.00, for which he asked relief. A general demurrer was imposed which being sustained, appellant refused to plead further. Appellant contended that the deed, being in form a bargain and sale deed, must be held to express the covenants contemplated by Ballinger's Code, Section 4520 (*Remington & Ballinger*, 8748):

If said instrument is in law a bargain and sale deed and a substantial compliance with the requirements of said Section 4520, it will

be unnecessary for us to discuss the question whether the interest thereby conveyed was a chattel or such an interest in realty as can be conveyed by deed only. In the absence of any statutory provisions many of the courts of last resort hold that the words "warrant, bargain and sell" when used in the conveyance in fee, do not imply any covenants. It was the evident purpose of the Legislature by the enactment of Section 4520 to provide that the words therein contained, to-wit: "Bargain, sell and convey," should express a covenant that the grantor was seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor, and that the grantee might in an action recover for breaches as if such covenant were expressly inserted.

The court said further:

The only question then to be considered is whether the substitution of the word "Grant," expressed in the deed, for the word "Convey," expressed by the statute, prevented said deed from being a substantial compliance with the statute.

After quoting definitions from Century Digest and the Encyclopedic Law Dictionary, the court continues:

From these definitions it will appear that the terms "convey" or "conveyance" and the word "grant" used in instruments intending

to alienate or transfer realty have substantially the same meaning. We think the use of the word "grant" in the deed instead of the word "convey" was a substantial compliance with the statute. We are warranted in holding that even though we assume the argument of respondent to be correct to the effect that only an interest in real estate was conveyed, yet the deed by operation of law did express a statutory covenant.

We deem the logic of this view controlling in the case at bar. The deed from Mary E. C. Morley and Fred Morley to R. C. Bell was a bargain and sale deed in view of the construction placed upon the statute in the above case; and the fact that the word "grant" was used instead of the word "convey" did not tend to convey the property without implying the covenants which are in a bargain and sale deed, namely, that the grantor was seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor.

In the case of *Barlow vs. Delaney*, 40 Fed. 97, the court, speaking through Justice Brewer, says:

The very purpose of the covenant is protection against defects, and to hold that one can be protected only against unknown defects would be to rob the covenant of more than one-half its value, besides destroying the force of its language. If from the force of the covenant

it is desired to eliminate known defects or to limit the covenant in any way, it is easy to say so. General in its language, it reaches all the facts within its terms, known or unknown.

From the foregoing we believe the following principles of law applicable to this case to be deducible.

1. That the statement of James D. Lacey & Company, as agent of Mary E. C. Morley and Fred Morley, that the timber would cruise 12 million feet, was a fraudulent statement of the material fact relied upon by the appellant, R. C. Bell, to his damage.

2. That the conveyance from Christopher William Whitford and wife to the predecessors of Mary E. C. Morley conveyed no title to the predecessors of Mrs. Morley in that it was recorded in Miscellaneous Records which are not recognized as part of the records in the State of Washington, and therefore the subsequent conveyance by Christopher William Whitford and wife, the grantors in the deed to the predecessors of Mrs. Morley, to the parties in New Mexico conveyed the title to said property to the parties in New Mexico.

3. That the deed was a bargain and sale deed containing the covenants implied in a bargain and sale deed.

Respectfully submitted,

KOLLOCK, ZOLLINGER & McDOWALL.

In The United States
Circuit Court of Appeals
for the Ninth Circuit

R. C. BELL and MARY A. BELL,
Appellants

VS.

MARY E. C. MORLEY and FRED MORLEY,
Appellees

Brief of Appellees

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

KOLLOCK & ZOLLINGER,
Solicitors for Appellants.

PLATT & PLATT,
Solicitors for Appellees.

Filed

MAY 1 - 1915

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Clerk.

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SOUTHERN DIVISION.

STATEMENT OF THE CASE

On the 22nd day of April, 1912, the appellees sold and conveyed to the appellants certain real property situated in Wahkiakum County, State of Washington, for the sum of thirty thousand dollars, of which seventy-five hundred dollars was paid in cash and the balance was covered by a series of promissory notes. One of these notes, bearing date April 22, 1912, was for the sum of fifty-six hundred

twenty-five dollars, payable twelve months after date, a copy of which note appears upon page 4 of the Transcript of Record. This note was secured by a mortgage dated the 22nd day of April, 1912, a copy of which mortgage appears in the Transcript of Record on page 5 thereof.

The case at bar was instituted by the appellees to foreclose this mortgage and collect the amount due upon this note. The complaint was in the usual form, alleging a breach of the conditions of the mortgage and praying for a foreclosure and sale as upon execution at law. In addition to the customary allegations of such a complaint, however, there appeared a further allegation setting forth a special provision of the mortgage to the effect that, if the mortgagors should desire to remove any timber before the payment of the notes secured by the mortgage, they should make a report in writing to the mortgagees before the 10th day of each month stating the amount of timber removed and should pay at the same time \$2.50 per thousand feet for all timber cut during the month, as shown in such report. The complaint also alleged a breach of this provision of the mortgage, together with a statement that the mortgagors were insolvent, and the prayer of the complaint called for a temporary restraining order restraining the mortgagors from selling and conveying certain sawlogs in their possession which had been removed from the mortgaged premises. The injunction order was granted, and before filing their answer the appellants executed

and delivered to the appellees a stipulation and bond providing in substance that, in consideration of the release of the sawlogs from the temporary restraining order, the appellants, as principals, and the American Surety Company of New York, as surety, would abide by and pay any judgment or decree that might be rendered in favor of the appellees in the present case, and that a judgment and decree might likewise be rendered against the surety as well as against the principal. A copy of this stipulation and bond appears on pages 39 to 45, inclusive, of the Transcript of Record, as part of the evidence introduced by appellees upon the trial.

In answer to the allegations of the complaint, the appellees admitted the execution and delivery of the note and mortgage referred to; likewise, the non-payment of the amount due thereon; but denied the alleged breach of the other provisions of the mortgage as to failure of the appellants to make monthly reports concerning the amount of timber removed, and further denied that there was due from appellant, R. C. Bell, to the appellees any sum of money.

The answer further alleged, by way of separate answer and defense, that the mortgage sued upon was a purchase money mortgage and that in the negotiations antecedent to the sale the firm of James D. Lacey & Company, acting as the agents and representatives of the appellees, represented to appellant, R. C. Bell, by way of inducement to the purchase of the lands herein referred to, that they

had carefully and accurately cruised said property and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good, merchantable timber; and further alleged that R. C. Bell accepted said representations as the representations of the owner of the property and believed the same and purchased the property and executed the promissory note and mortgage referred to in the complaint in reliance upon said representations and would not have purchased said property or executed said note and mortgage if he had not believed said representations; the answer further alleged that said representations were false, untrue and fraudulent, in that there was only 7,916,999 feet of timber, exclusive of hemlock, and that the appellants were damaged by such fraudulent representations in the sum of \$9167.57, which sum the appellants sought to counterclaim against the amount of the note set forth in the appellees' complaint.

The answer also contained a second further answer and defense, to the effect that the conveyance from the appellees to the appellants contained, amongst other lands, the southeast quarter of the southeast quarter of section twenty-four, township ten north, range eight west of the Willamette Meridian, together with the right to remove the timber thereon within twenty years from the 8th day of August, 1906, and that neither at the time of the execution of the deed from the appellees to the appellants, nor at the time of the execution of the

mortgage set forth in the appellees' complaint, did the appellees have any right, title, or interest to this property and were unable to convey good title to R. C. Bell, and that, by virtue of such fact, R. C. Bell was unable to remove about 1,000,000 feet of timber and was, consequently, damaged in the sum of \$2500.

The reply of the appellees admitted that the cruise made by James D. Lacey & Company showed 11,584,000 feet of timber, exclusive of hemlock, but denied all of the allegations of fraudulent representations, and alleged, by way of a separate reply, facts constituting an estoppel against the right of R. C. Bell to allege that he was damaged in any way by the failure of the appellees to give him title to the southeast quarter of the southeast quarter of Sec. 24, Tp. 10 N., R. 8 W. W. M.

This plea of estoppel recited that, prior to the consummation of the sale and purchase by and between the appellees and appellants, of the lands embraced in the deed of conveyance, and prior to the execution of the mortgage involved in this suit, the appellants knew and were advised of the fact that, through inadvertance and mistake, one of the predecessors in interest of the appellees had recorded his deed of conveyance in a book known as "Miscellaneous Records," instead of the record book called the "Record of Deeds," and were advised of the fact that the legal title to said timber was vested in the appellees, regardless of the fact that said deed had been inadvertantly and mistakenly recorded in "Miscellaneous Records"; and having

full knowledge of the existence of such facts, and having consulted an attorney at law concerning the legal effect of such facts, and acting with full knowledge of the existence of such facts, the appellants agreed to purchase the timber on said land from the appellees, upon condition, as agreed between the parties, that Harrison G. Platt and Robert Treat Platt furnish the appellant R. C. Bell with an agreement providing that they would protect the appellants against any claim which might be asserted against the title to said land on account of the fact that one deed in the chain of conveyances had been inadvertantly recorded in "Miscellaneous Records"; and that the appellants accepted the deed of conveyance covering this particular tract of land, together with the agreement from Harrison G. Platt and Robert Treat Platt, with full knowledge of the fact that said agreement was in lieu of a covenant of title to said land and was executed contemporaneously with the deed to said land and received by the appellees with full knowledge of the existence of said alleged defect of title, but with the understanding that the appellees were to be in this manner protected against any difficulties which might arise on account of said alleged defect.

The agreement referred to was in the alternative, providing either that Harrison G. Platt and Robert Treat Platt should protect the appellees against any attempted claim of title to the land or procure a deed for the appellants.

The estoppel referred to further alleged that a deed to the timber on this land had been procured and was held in the interest of the appellees, and further alleged that the appellees had never presented to the appellants any claim whatsoever that any person had asserted or attempted to assert any right against the title to the timber on said land.

The case came on regularly for trial, and after listening to the evidence of both parties the court found, as a matter of fact, that there were no false or fraudulent representations made by the appellees or their agents concerning the amount of timber on the land conveyed, and further found that the agreement to protect the appellants as to the title to a certain portion of the land was given for the purpose of handling the situation that confronted the parties, and that the bond and deed were to be construed together and the liability of the parties was to be determined by the arrangement upon which they had agreed.

Based upon these findings of fact, the court entered a decree of foreclosure and likewise entered judgment against the American Surety Company, as provided in the stipulation and bond upon which the parties had agreed at the time of releasing the logs from the temporary restraining order.

POINTS AND AUTHORITIES.

I.

Where, in a suit to foreclose a mortgage, a defendant seeks to abate the purchase price on the ground of fraud, the same rules apply as in an action for deceit.

Kingman & Co. v. Stoddard, 85 Fed. 740.

II.

In order to establish an action for deceit, the representations must have been knowingly false or so recklessly extravagant as to amount to fraud.

Pittsburg Life & Trust Co. v. Northern C. L. Ins. Co., 140 Fed. 888.

Hodgens v. Jennings, 148 App. Div. 879; 133 N. Y. Supp. 584.

Stolitzky v. Linscheid, 150 App. Div. 253; 134 N. Y. Supp. 805.

Hindman v. Bank, 112 Fed. 931; 50 C. C. A. 623.

Kumber v. Young, 137 Fed. 744.

Pomeroy's Equity Jurisprudence, Secs. 882, 883, 884, 885, 886, 887 and 888.

III.

Where a purchaser takes a deed without covenants, he has no right to retain purchase money, or recover it in case of payment, on account of defects in title.

Rawle on Covenants, Sec. 319.

Devlin on Deeds, Sec. 957.

Sutton v. Sutton, 7 Gratt. 238 (Va.).

Gouvenor v. Elmendorf, 5 Johns Chancery, 79.

Decker v. Shultze, 11 Wn. 47; 39 Pac. 263.

IV.

The findings of a court in a suit in equity must be taken as presumptively correct, and, unless an obvious error has intervened in the application of the law or some serious and important mistake has been made in the consideration of the evidence, such finding will not be disturbed by the appellate court.

Thorndyke v. Alaska Perseverance Mining Co., 164 Fed. 657, 665 (C. C. A., 9th Circuit).

Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 88 (C. C. A., 8th Circuit).

V.

Where the parties have employed express covenants in a deed, the law does not imply any covenants, especially where the express covenants of the deed and the implied covenants of law are inconsistent, in which instance the express covenants control.

Douglas v. Lewis, 131 U. S. 75; 33 L. Ed. 53.

Leddy v. Enos, 6 Wn. 247; 33 Pac. 508.

Glenn v. Baltimore, 10 Atl. 70 (Md.).

Dun v. Deitrich, 3 N. Dak. 3; 53 N. W. 81.

Finley v. Steele, 23 Ill. 56.

Stewart v. Anderson, 10 Ala. 504.

Winton v. Vaughan, 22 Ark. 72.

Morris v. Harris, 9 Gill. 19 (Md.).

Hoy v. Taliaferro, 16 Miss. (18 Smedes & M.)
727.

Duncan v. Lane, 16 Miss. (18 Smedes & M.)
744.

Witty v. Hightower, 20 Miss. (— Smedes &
M.) 478.

Kent v. Welch, 7 Johns. 258; 5 Am. Dec. 266.

VI.

Fraud is never presumed, but must be clearly made out. The false representation must be material and must be acted on in the belief of its truth. If the purchaser investigates for himself and nothing is done to prevent a full investigation, he cannot say that he relied on the vendor's representation.

Farrar v. Churchill, 135 U. S. 609; 34 L. Ed.
247, 250.

VII.

The Federal courts take judicial notice, without plea or proof, of the laws of every state of the United States.

Lamar v. Micou, 114 U. S. 218; 29 L. Ed. 94, 95.

VIII.

The rule that the law of the state where the land lies governs the interpretation of a deed does not warrant the implication of personal covenants not authorized by the law of the state where the deed was made.

Worley v. Hineman, 6 Ind. App. 240; 33 N. E. 260.

Bethell v. Bethell, 54 Ind. 428.

Jackson v. Green, 112 Ind. 341; 14 N. E. 89.

Phelps v. Decker, 10 Mass. 275.

ARGUMENT.

The present appeal presents for determination the correctness of the trial court's findings and the correctness of the legal principles which the court applied to the facts found.

The first issue presented was the question of alleged fraudulent representations by the appellees to the appellants concerning the amount of timber upon the lands conveyed and covered by the mortgage sued upon in this case. In other words, the defense proceeded upon the theory that if, in the sale of real property between the appellants and the appellees, the appellees made certain fraudulent representations upon which the appellants relied, to their damage, the appellants could, in a suit to foreclose the mortgage given to secure the notes issued as part of the purchase price, offset any claim for damages they might have on account of such fraudulent representations. The accuracy of this theory as a general proposition was not disputed by the appellees, but its application to the facts of the present case was denied, and the appellees' position in this particular was in effect sustained by the trial court.

A careful reading of the answer filed in the case at bar will disclose no allegations that the appellees falsely and fraudulently misrepresented the amount of timber on the land, but that the appellees represented they had made a cruise and the cruise showed a certain amount of timber. The language referred to is as follows:

“* * * to induce said defendant to purchase the same and to execute the note and mortgage described in the complaint, as and for the purchase price thereof, the said James D. Lacey and Company represented to the said defendant, R. C. Bell, that they had carefully and accurately cruised said property, and that there was on said property, as shown by said cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good and merchantable timber.”

(Page 26, Transcript of Record.)

The James D. Lacey & Company referred to were the agents of the appellees in negotiating the sale.

It will be observed, as already stated, that the language of the answer above quoted charges the agents of the appellees with having represented that they had carefully and accurately cruised said property and that there was on said property, as shown by the cruise, a certain amount of timber.

From the beginning to the end of the trial, the appellees objected to the introduction of any evidence as to alleged fraudulent representations concerning the amount of timber upon the land conveyed, upon the ground that the answer had speci-

fically limited the claim of the appellants to the contention that the appellees had represented that the cruise which they had made showed so many feet of timber, and that the only evidence of fraud which would be admissible under such an allegation would be evidence to show that the appellees had fraudulently made an improper cruise and presented it to the appellants, or that they had made one cruise and then presented to the appellants an entirely different cruise showing more timber than the actual cruise showed. No evidence of this character was offered, and no contention of this kind was made. Furthermore, Mr. Bell himself, one of the appellants, testified that, in a conversation with Mr. Langille, the authorized representative of James D. Lacey & Company, he stated to Mr. Langille, while being shown the cruise which James D. Lacey & Company had made, that he presumed that was a fair, careful estimate, with a fair overrun, and that he further stated to Mr. Langille as follows:

“‘If you tell me that it will run 12,000,000 feet, I will give you thirty thousand dollars; I will give you two dollars and a half per thousand and will throw out the hemlock.’ He (Langille) said, ‘I believe it will run twelve million feet; it has been cruised conservatively.’”

(Transcript of Record, pages 48, 49.)

This, as we recall, was the only evidence of any fraudulent representations which was offered by the appellants on the trial of this case, and it will

be observed, from a reading of the testimony referred to that James D. Lacey & Company, acting through Mr. Langille, merely expressed the belief that the timber would run 12,000,000 feet and did not guarantee or attempt to guarantee that it would absolutely run 11,584,000 feet or any other amount. In fact, Mr. Bell himself further testified that, prior to buying this tract, he had done considerable logging in that vicinity and, although he had not been on this particular tract, he had seen it, showing that he had full opportunity to investigate the premises; and Mr. Langille testified, as shown on page 77 of the Transcript of Record, that he described the land to Mr. Bell and that Mr. Bell stated to him that he was more or less familiar with this country and had some general knowledge of the tract in question, at which time Mr. Bell also stated to him that he intended to look the property over with his foreman; and, as appears from the evidence shown on page 79 of the Transcript of Record, Mr. Langille also testified that at subsequent interviews with Mr. Bell he asked Mr. Bell if he had looked over the property, and Mr. Bell stated that he had. Again, as shown on page 83, of the Transcript of Record, Mr. Langille testified as follows:

“We had a good deal of talk relating to the values of the timber and I made it very clear to Mr. Bell at all times that we were selling him so much land for so much money. That we were not undertaking to guarantee our

cruise. We never guaranteed any cruise. We simply represent it according to our cruise. That is all we can do, because no man can guarantee a cruise.”

(Transcript of Record, page 83.)

Mr. Langille also testified, as shown on page 77, of the Transcript of Record, *that the cruise which he showed Mr. Bell was the same cruise upon which the appellees had purchased the property.* The only other evidence of Mr. Bell’s action with reference to relying on this cruise is the admission of Mr. Langille, as shown on page 79 of the Transcript of Record, that Mr. Bell stated to him that he was not going to cruise the property but was going to rely upon the cruise of James D. Lacey & Company.

Furthermore, counsel for the appellants, in his closing argument, made the following statement:

“I would say that we have not alleged here intentionally any actual fraud on the part of James D. Lacey & Company and cannot now charge any such fraud. We attempted to draw our pleadings and present the case as we thought the facts to be, neither the defendant nor myself, as his attorney, believed there was any actual fraud on the part of James D. Lacey & Company, particularly on the part of Mr. Langille, their representative and manager. * *

“The testimony here shows, and I presume it is a matter of common knowledge, that no logger could operate on a shortage of 25 per cent or 20 per cent from the estimate on which

he purchased the property and that a company with the reputation of James D. Lacey & Company, and their business, if it be true that their cut underruns 25 per cent or 20 per cent in this particular case would be chargeable with such gross disregard as to whether or not the facts are true which are stated, that it might be held as fraud in law, but I disclaim any intention to charge actual fraud, or actual intention to deceive on the part of that company."

(Transcript of Record, pages 114 and 115.)

In addition to the testimony above set forth, the appellees offered the testimony of W. G. Collins and Arthur Thrane, the gentlemen who actually made the cruise which Mr. Langille showed to Mr. Bell, and they testified in detail as to the care with which the cruise was prepared, and also testified that the said cruise was honestly made and made according to the established and best known methods of cruising. This testimony appears on pages 85 to 94, inclusive, of the Transcript of Record. Both of these gentlemen qualified as having had considerable experience in the cruising business, and no attempt was made to question their standing or their character.

It was alleged in the complaint, and the appellees offered considerable testimony to establish the fact, that the logging carried on by the appellants upon the land in question was not carried on according to careful and recognized methods of logging and that, as a result, the appellants had failed to procure from the lands in question the

full amount as shown by the cruise, owing to their extravagant and wasteful methods.

The appellees also established, by Messrs. Langille, Collins, Thrane, Croman, King, and Van Orsdal, that there exists in the trade of timber cruising a general custom which recognizes the existence of a standard of variance between the amount of timber shown by a cruise and the amount of timber which could be removed by reasonable and careful methods of logging, and that such standard permits a variation of at least ten per cent. In other words, it seems to be understood in the timber cruising business, according to this testimony, which is undisputed, that a cruise is merely an estimate, worked out on as nearly an accurate basis as is possible, and that the actual amount of timber may easily vary from this estimate ten per cent, without seriously affecting the value of the estimate in the trade of timber cruising. That is, if a man experienced in the timber business were to make a purchase based upon a cruise, he would not treat the cruise as an exact estimate of the timber but consider as a matter of experience that the actual number of feet might vary as much as ten per cent from the amount shown on the estimate.

Based upon this evidence and the admissions of counsel for the appellants, the court found as follows regarding the question of fraudulent representations:

“I find there was no representation of the fact made by Mr. Lacey on behalf of the plaintiffs in this case, regarding the amount of timber there was on this land. The only representation of fact made was that the cruise had been made of the land, timber on the lands, for the purpose of purchase when the Morleys acquired the lands; coupled with the expressed opinion, when asked how much it would overrun the cruise, that it would run as much as twelve million feet.

“There being no direct and positive representation of fact as to the amount of timber on the land, the court must go further and see what other things are involved in the case.

“Counsel in his closing argument appeals to the standing of these people as cruisers. There was not any such confidential relation existing between the defendants Bell and the Lacey Company (James D. Lacey & Company), as to warrant Bell in placing any particular reliance on the expression of their opinion as he would upon the opinion of somebody he had hired or his own agent.

“There is no evidence to support a finding that the expression of belief was so reckless and grossly exaggerated as to warrant the court in finding there was actual intent to deceive.

“Then we come to this cruise upon which he bases his opinion and the evidence in the case seems to indicate that it was made according to the accepted method of cruising by men who are unimpeached and who are experienced, and the court finds that there is nothing in the case to warrant the assumption that

Mr. Langille was careless in expressing that opinion, let alone the court being able to find that it is clearly and satisfactorily established as asserted that there was fraud. A mere preponderance of the evidence is not sufficient where fraud is charged or something tantamount to fraud."

(Transcript of Record, pages 115 and 116.)

The findings of fact made by the court are well supported by the evidence, and, as already stated, the only charge in the pleadings was that the appellees had shown to the appellants a cruise, accompanied with the representation that such cruise had been carefully and accurately made and that as shown by said cruise there was 11,584,000 feet of timber, exclusive of hemlock.

The principles of law applied by the court to these facts seem to be the only remaining question upon this branch of the case, and the rules of law adopted by the court are of such a well-recognized and primary character that we have encountered considerable difficulty in finding any adjudications upon the subject.

In the case of *Kingman & Co. v. Stoddard*, 85 Fed. 740, the Circuit Court of Appeals for the Seventh Circuit made the following observation in reference to the right of a purchaser to plead fraud by way of defense to an action for the contract price of the article sold. While the immediate case before the court was an action at law for deceit, the following observation is of value in establishing

a standard by which to determine the character of evidence necessary to establish fraud as a defense in an action for the contract price:

“The remedy by way of defense is allowed to avoid circuitry of action, and it is grounded upon and is governed by the same principles as the action for deceit. If the one cannot prevail, the other must fall. If the one can be sustained, the other is upheld. Judgment in the one case is *res adjudicata* and concludes the right. *Burnett v. Smith*, 4 Gray, 50.”

Kingman v. Stoddard, 85 Fed. 740, 750.

According to the rule above announced, it would seem that the defense of fraud, where a party is seeking a counterclaim based on fraudulent representations, as against the amount due as the purchase price of an article sold, is governed by the same rules as those which govern an action for deceit, and that the same allegations are, therefore, necessary. The party defending as against the purchase price, on the ground of fraud, is in an entirely different position from a party seeking rescission on the ground of fraud. In the case of the rescission of a contract, the party claiming to have been defrauded tenders back the subject-matter of the sale and asks to have the parties placed in the same position they were before the alleged false representations were made. In the case of a defense and counterclaim against the contract price of an article sold, however, the defendant seeks to retain the subject-matter of the sale and at the same time

to obtain a reduction in the purchase price on the ground of alleged fraudulent representations.

That is exactly the case at bar, and in such cases, where the party is retaining the subject-matter of the sale and has derived benefits from the sale, a much higher degree of proof is necessary than in those cases where the party offers to return the subject-matter and rescind the contract. This is undoubtedly the basis of the rule above announced, that the rules applicable to an action for deceit are likewise applicable to a defense of fraud in an action for the contract price. In other words, if the party who claims to have been defrauded sets up such fraud in an action on the contract price, he is proceeding on exactly the same theory as if he had originally instituted an action for damages on account of deceit, and instead of appearing as a party plaintiff in an action he is permitted to defend and counterclaim those damages against the amount due on the original contract price.

Proceeding upon the theory that a defense seeking to abate a part of the purchase price on account of fraudulent representations in the procurement of the sale is governed by the same rules as an action for deceit, we turn for a moment to a few of the adjudications setting forth the necessary elements of an action for deceit. The following authorities establish that an averment and proof of scienter is necessary in order to establish fraud and deceit.

In the case of

*Pittsburg Life & Trust Co. v. Northern C. L.
Insurance Company*, 140 Fed. 888,

which was an action at law for deceit, it was held that such an action is based on fraud and that to sustain it there must not only have been false representations, but, contrary to the rule in suits for rescission, they must have been made fraudulently and intentionally or must have been made so recklessly and without regard to their truthfulness as to be equivalent to actual fraud. The court said:

“Disposing of this branch of the case before proceeding to another, it is to be noted that the plaintiffs are not suing on the agreement, to have the defendants make good the insurance reserve, which it might possibly be claimed, notwithstanding the figures there found, that they were bound for; although they are in reality asking damages, in a way, quite foreign to the action, that would effectively do so. Neither are they seeking to set the agreement aside, on the ground of material misrepresentation; to which relief they might possibly be entitled. They hold to the bargain, but claim that they were overreached and cheated in making it, which must therefore be established in order to entitle them to a verdict. This is the gist of the action, and as a clear apprehension of it is necessary to a correct disposition of the case, let us look at some of the authorities.

“ ‘The action for deceit at common law,’ says Lord Fitzgerald in *Derry v. Peek*, L. R. 14 App. Cas. 337, ‘is founded on fraud. It is essential

to the action that moral fraud should be established, and since the case of *Collins v. Evans*, 5 Q. B. 804, 820, in the exchequer chamber, it has never been doubted that fraud must concur with the false statement to maintain the action. It would not be sufficient to show that a false representation had been made. It must further be established that the defendant knew, at the time of making it, that the representation was untrue, or, to adopt the language of the learned editors of the Leading Cases, that ‘the defendant must be shown to have been actually and fraudulently cognizant of the falsehood of his representation, or to have made it fraudulently without belief that it was true.’ In the same case it is said by Lord Herschel:

“ ‘I think the authorities established the following propositions: First, in order to sustain an action of deceit there must be a proof of fraud, and nothing short of that will suffice; secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless whether it be true or false.’

“So in *Lord v. Goddard*, 13 How. 198, 14 L. Ed. 111, it is said by Mr. Justice Catron:

“ ‘The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means intention to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue.’

“Similarly, it was declared in *Union Pacific R. R. v. Barnes*, 64 Fed. 80, 12 C. C. A. 48, that an action of deceit ‘requires for its foundation a false statement knowingly made, or a false statement made in ignorance of, and in reckless disregard of its truth or falsity, and of the consequences such a statement may entail. The evil intent—the intent to deceive—is the basis of the action.’ And in *Hindman v. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108, it is said by Judge Lurton:

“‘Before the plaintiff can recover in an action of deceit he must prove two things: That the representation was false; and that the person making it knew it was false. * * * Such an action differs essentially from one brought for rescission of a contract on the ground of misrepresentation. In the latter kind of suit it is immaterial whether the representation was made dishonestly or not. If the contract was obtained by misrepresentation, however honestly made, it cannot stand. But when the action is for fraud and deceit, it is not enough to show that the representation was untrue, for, if it was honestly believed to be true, that is a good defense.’

“It is also well said by Judge Hook, in *Kimber v. Young*, (C. C. A.), 137 Fed. 744:

“‘The basis of the action of deceit is the actual fraud of defendant—his moral delinquency; and therefore his knowledge of the falsity of the representation, or that which in law is the equivalent thereto, must be averred and proved. There is much confusion in the authorities upon this subject, due in part to the er-

roneous assumption, that that which is merely of evidence of fraud is equivalent to the ultimate fact which it tends to prove, and also to the assumption, likewise erroneous, that an untrue representation which would be sufficient to support a suit in equity for a rescission of a contract is equally as available in an action of deceit.'

"The law as thus laid down is well settled, however it may not be kept in mind in some of the cases; and confusion only arises where it is departed from. The question is whether anything within it is made out here. Clearly not, so far as respects any positive intent to deceive. It is not claimed, for instance, that the officers of the defendant company got up a deceptive list of policies for Mr. Dawson to make his computation upon, in order to secure a better bargain than they otherwise could. The list which was used was made out long before the parties came together, and entirely independent of that fact, for the purpose of having the opinion of Mr. Dawson as consulting actuary with regard to the condition of the company. And the same is true with respect to the computation based upon it, except only as to the extensions for July business. It is impossible from this to make out anything like intended fraud.

"Admitting this to be so, however, the plaintiffs contend, that knowing that reliance was being placed upon the list, the officers of the defendant company were bound to see that it was correct, and are to be judged the same as though they asserted that it was; of which, if they had no actual knowledge, they are convicted

of such recklessness as amounts to fraud. It is no doubt true, that a false statement, recklessly made, without knowledge of its truth or falsity, is the equivalent of actual fraud, being the same in effect as if uttered knowingly. Story, Eq. Juris. Sec. 193; *Cooper v. Schlesinger*, 111 U. S. 148, 4 Sup. Ct. 360, 28 L. Ed. 382; *Hindman v. Bank*, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; *Kimber v. Young* (C. C. A.), 137 Fed. 744. Care must be taken, however, in enforcing this rule; having regard to the alternative for which it stands. It is not every misstatement that amounts to a cheat and a fraud. These are strong terms, implying moral obliquity, and are not to be lightly applied. To be so characterized, the statement or representation must not only be untrue, but must be made without concern whether it is or not, and consideration must therefore be given to the circumstances under which it is made."

Pittsburg Life & Trust Co. v. Northern C. L. Ins. Co., 140 Fed. Rep. 888.

In the case of

Hodgens v. Jennings, 133 N. Y. Supp. 584,

it is said:

"The second subdivision of the first defense is also insufficient in law, for the reason that, while it undertakes to set up false representations made by plaintiff to induce defendant to purchase the receiver's certificates for which the note in suit was given, there is no allegation that these representations were false to the knowledge of plaintiff when made, and scienter is one of the necessary elements of fraud.

Kountze v. Kennedy, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651.”

Hodgens v. Jennings, 148 App. Div. 879, 133 N. Y. Supp. 584.

Again:

“But we are of the opinion that the facts stated in the counterclaim are insufficient to sustain an action for damages for deceit, because there is no allegation that plaintiff, when he made the statement as to the size of the lot and of the house thereon, knew that such statements were false, or, in ignorance of the truth or falsity thereof and indifferent as to the fact, made such statement recklessly, paying no heed to the injury which might ensue. Such an allegation, or an allegation that the statement was fraudulently made, is absolutely essential. *Bradbury on Rules of Pleading*, 329; *Kountze v. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *McIntyre v. Buell*, 132 N. Y. 192, 30 N. E. 396; *Inderlied v. Honeywell*, 88 App. Div. 144, 84 N. Y. Supp. 333; *Carr v. Sanger*, 138 App. Div. 32, 122 N. Y. Supp. 593. For anything that appears in the statement of facts constituting the counterclaim, plaintiff, in good faith, and in an honest, although mistaken, belief as to its true dimensions, represented to defendant that the house was 20 feet in width, instead of 18 feet. It may be urged that this is improbable, in view of the fact that plaintiff now claims that he never intended to convey a lot more than 18 feet wide; but the sufficiency of the counterclaim must be determined by the allegations contained therein, and, so tested,

within the rule above stated, these are insufficient.”

Stolitzky v. Linscheid, 150 App. Div. 253, 134 N. Y. Supp. 805.

To the same effect are,

Derry v. Peek, L. R. 14 App. Cases 337.

Hindman v. Bank, 112 Fed. 931, 50 C. C. A. 623.

Kimber v. Young (C. C. A.), 137 Fed. 744.

In Pomeroy's Equity Jurisprudence, it is said: Sec. 882:

“III. Untruth of the Statement.—The statement of fact must be untrue, or else there is no *misrepresentation*. The entire doctrine of the law and of equity concerning that species of fraud which consists in *suggestio falsi* is based upon the assumption that the representation is in fact untrue, as this very name itself shows. This is the premise of fact which is assumed in every case which discusses the nature of fraud, and decides whether it does or does not exist in any particular instance. This requisite element needs, therefore, no examination and no citation of special authorities; it is not susceptible of any exception or limitation.”

Sec. 883:

“IV. The Intention, Knowledge, or Belief of the Party Making the Statement.—This element—the mental state or condition of the party making the representation—is the most important and characteristic feature of fraud, both in equity and at law. It is, moreover, that constituent of fraud with respect to which there ex-

ists the principal difference or divergence between the theory which prevails in equity and that which forms a part of the law. It will aid us, therefore, in obtaining a more accurate notion of the equitable conception by comparison, to present a very brief summary of the doctrine on this subject which has been settled by courts of law."

Sec. 884:

"The Knowledge and Fraudulent Intention Requisite at Law. The court of queen's bench at one time maintained, in a series of decisions, the following doctrines: Whenever one party to a transaction, A, made a representation of fact which was in reality untrue, and the other party, B, relied upon the statement, and was induced by it to do or to omit something, and thereby suffered some damage, such representation was fraudulent, and A was liable for his actual fraud, even though he had made the statement without any knowledge of its untruth,—his liability was independent of his knowledge or ignorance of its actual falsity. This theory admitted the possibility of fraud at law where there was no moral delinquency; it denied that moral wrong was an *essential* element in the legal conception of fraud. The same view was for a time accepted and adopted by a considerable number of decisions in different American states. These cases have, however, been overruled, and the theory itself has been abandoned, in England, and even generally, if not universally, throughout the states of our own country. It is now a settled doctrine of the law that there can be no fraud, misrepresentation, or conceal-

ment without some *moral* delinquency; there is no actual *legal* fraud which is not also a *moral* fraud. This immoral element consists in the necessary guilty knowledge and consequent intent to deceive,—sometimes designated by the technical term, the *scienter*. The very essence of the legal conception is the fraudulent intention flowing from the guilty knowledge. No misrepresentation is fraudulent at law, unless it is made with actual knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time when he makes it. It is well settled that fraudulent misrepresentations may assume the three following forms or phases at law: 1. A party making an untrue statement has at the time an actual, positive knowledge of its falsity; he states what he absolutely knows to be untrue. This is the simplest, plainest, and most direct species of fraud. 2. A party making an untrue statement does not at the time have any belief that it is true. The making an untrue statement, of the truth of which the party of course has no knowledge, and which he does not even believe to be true, is tantamount to the making of a statement which the party knows to be untrue. 3. Finally, a party making an untrue statement, having at the time no knowledge whatever on the subject, *and no reasonable grounds to believe it to be true*, is guilty of fraud, and his claiming that he believed it to be true cannot remove its fraudulent character. A definite statement of what the party does not know to be true, where he has no reasonable grounds for believing it to be true, will, if false,

have the same legal effect as a statement of what the party positively knows to be untrue. In each of these three phases there is a *moral* wrong, and a very slight, if any, difference in degree of the culpability. In each there is actual knowledge of the untruth, or else the law conclusively imputes knowledge to the party, and treats him as though actually possessing it."

Sec. 885:

"Knowledge or Intention Requisite in Equity.—There are undoubtedly some authorities which, taken literally, would make *moral* wrong a necessary ingredient of fraud in equity as well as at law, since they require a guilty knowledge of the untruth as an essential element. This view is, however, certainly incorrect. It is fully settled by the ablest courts, English and American, that there may be actual fraud—not merely constructive fraud—in equity without any feature or incident of *moral* culpability; that the actual fraud consisting of misrepresentation is not necessarily immoral. A person making an untrue statement, without knowing or believing it to be untrue, and without any intent to deceive, may be chargeable with actual fraud in equity. Whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes farther, and includes instances of fraudulent misrepresentations which do not exist in the law. There are, however, well-established limits to this equitable conception, which should be carefully observed. Every wrongful act, even by persons in positions of trust and confidence, which gives occasion for

a remedy is not fraudulent. Breaches of their duty by persons in fiduciary relations, acts of agents in excess of their authority, and the like, are not, as such, instances of actual fraud, although they may sometimes fall within the division of 'constructive fraud.' I shall, in further illustration of this subject, enumerate and describe the different phases and forms of fraudulent misrepresentations recognized by equity, some of them being identical with those found in the law."

Sec. 886:

"Forms of Fraudulent Misrepresentations in Equity.—1. Where a party makes a statement which is untrue, and has at the time an actual, positive knowledge of its untruth, and the necessarily resulting intent to deceive,—the *scienter* at law. This is the most direct, and in some respects the highest, form of fraud. Wherever the facts of the statement are the acts of the very party making it, which are represented as having been done by him, if the statement is untrue, the knowledge of its untruth is necessarily and conclusively imputed to the party. In all cases involving such kind of misrepresentation, if knowledge of the untruth be a requisite element of the liability, such knowledge will be conclusively presumed. In suits involving misrepresentations of this form, if the party charged with the fraud is examined as a witness in his own behalf, the better rule is, that he cannot be asked, as a part of his examination in chief, whether or not he believed his representation to be true. 2. If a person makes an untrue statement, and has at the time no knowledge of its

truth, and even has no *belief* in its truth, he is chargeable with fraud in equity as well as in law. Making a statement which the party does not believe to be true is only slightly removed in culpability from the making a statement which the party knows to be false.

“Sec. 887. The Same. 3. Where a person makes an untrue statement, and has at the time no knowledge of its truth, and there are no reasonable grounds for his believing it to be true, he is chargeable with fraud, although he had no absolute knowledge of its untruth, and may claim to have had a belief in its truth. This is a mode in which the rule is ordinarily laid down by courts of law, and sometimes by courts of equity. The equity cases have, however, settled the rule in somewhat broader terms, omitting entirely the qualification ‘that there are no reasonable grounds for the person’s believing his statement to be true.’ In other words, it is settled in equity by an overwhelming array of authority that where a person makes a statement of fact, which is actually untrue, and he has at the time no knowledge whatever of the matter, he is chargeable with fraud, and his claim to have believed in the truth of his statement cannot be regarded as at all material. The definite assertion of something which is untrue, concerning which the party has no knowledge at all, is tantamount in its effects to the assertion of something which the party knows to be untrue.

“Sec. 888. The Same.—4. *Where a person makes a statement of fact which is untrue, but at the time of making it he honestly believes it to be true, and this belief is based upon reason-*

able grounds which actually exist, the misrepresentation so made is not fraudulent either in equity or at law. This general proposition is subject, however, to the two following important limitations: 5. Where such an untrue statement is made in the honest belief of its truth, so that it is the result of an innocent error, and the truth is afterwards discovered by the person who has innocently made the incorrect representation, if he then suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in equity, a fraudulent representation, even though it was not so originally. 6. Finally, if a statement of fact, actually untrue, is made by a person who honestly believes it to be true, but under such circumstances that the *duty* of knowing the truth rests upon him, which, if fulfilled would have prevented him from making the statement, such misrepresentation may be fraudulent in equity, and the person answerable as for fraud; forgetfulness, ignorance, mistake, cannot avail to overcome the pre-existing *duty* of knowing and telling the truth."

Again :

"The general principles applicable to cases of fraudulent representation are well settled. Fraud is never presumed; and where it is alleged the facts sustaining it must be clearly made out. The representation must be in regard to a material fact, must be false and must be acted upon by the other party in ignorance of its falsity and with a reasonable belief that it was true. It must be the very ground on

which the transaction took place, although it is not necessary that it should have been the sole cause, if it were proximate, immediate and material. If the purchaser investigates for himself and nothing is done to prevent his investigation from being as full as he chooses, he cannot say that he relied on the vendor's representations. *Southern Development Company v. Silva*, 125 U. S. 247 (31:678). 'If the party to whom the representations were made,' remarked Lord Langdale, in *Clapham v. Shillito*, 7 Beav. 149, 'himself resorted to the proper means of verification, before he entered into the contract, it may appear that he relied on the result of his own investigation and inquiry, and not upon the representations made to him by the other party; or if the means of investigation and verification be at hand, and the attention of the party receiving the representations be drawn to them, the circumstances of the case may be such as to make it incumbent on a court of justice to impute to him a knowledge of the result, which, upon due inquiry, he ought to have obtained, and thus the notion of reliance on the representations made to him may be excluded.' "

Farrar v. Churchill, 135 U. S. 609, 34 L. Ed. 246, 250.

Viewing the facts found by the court in the light of these rules, we find an absolute absence of necessary allegations in the pleadings and of necessary proof in the evidence. There is no allegation and there is no evidence that the appellees or their agents, James D. Lacey & Company, ever made or attempted to make any fraudulent representations

concerning the amount of timber upon the lands which they sold, or that they ever made any representations whatsoever with an intention to deceive. On the contrary, counsel for appellees, as already shown, stated in his argument as follows :

“I disclaim any intention to charge actual fraud, or actual intention to deceive on the part of that company.”

(Transcript of Record, page 115.)

Furthermore, as already stated, the only allegation of the pleading is that the appellees, acting through James D. Lacey & Company, represented to appellants that they had made a careful and accurate cruise of the timber on the land which they sold, and the undisputed evidence presented upon the trial of this case is that the cruise which they did show to Mr. Bell prior to the making of the sale was actually made by competent and experienced cruisers, whose integrity and standing is unquestioned and whose statement that a cruise is but an estimate and may easily vary at least ten per cent from the actual amount of timber on the ground is likewise unquestioned. In addition to this, Mr. Bell himself testified that Mr. Langille merely expressed to him the belief that the timber might run in excess of the cruise and did not dispute the statement of Mr. Langille, so far as we have been able to find, to the effect that Mr. Langille made clear to Mr. Bell that the appellees were selling so much land for so much money and were not undertaking to guarantee the cruise. (Transcript of Record, page 83.)

In view of this evidence and of the rules of law above set forth, we think that the court's findings and decision upon the branch of the case relating to the defense of fraudulent representations are completely substantiated by the facts established in this particular case and by the rules of law announced in analogous cases.

Furthermore, it is an established and well recognized rule that the findings of a trial court will be given great weight by the appellate court. This rule is based upon the well recognized principle that the trial court has a greater advantage in seeing the witnesses themselves and their manner of testifying and in determining the general attitude of the parties in relation to a controversy. This rule is peculiarly applicable to a case like the one at bar, where there is a charge of misrepresentation on one side or the other in relation to the dealings between the parties. In transactions involving the sale of property, it is very easy for a purchaser whose speculation has not been all that he anticipated to charge the seller with misrepresentations in order to escape the payment of the purchase price, and in determining the existence or non-existence of such alleged misrepresentations it is almost necessary for the tribunal chosen to determine the controversy to see the parties themselves and judge of their demeanor, as well as to hear the evidence which they have to offer. This advantage, of necessity, rests entirely with the trial court and gives to his findings great value.

The following decisions very clearly state the rule as to the efficacy of a trial court's findings in equity cases :

“Whatever conflict there is in the evidence was resolved against the plaintiffs by the judge of the court below, whose findings are in cases like the present always to be taken as ‘presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the findings should not be disturbed.’ *North American Exploration Co. v. Adams*, 104 Fed. 404, 45 C. C. A. 185; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris*, 145 U. S. 134, 12 Sup. Ct. 821, 36 L. Ed. 649.”

Thorndyke v. Alaska Perseverance Mining Co., 164 Fed. 657, 665 (C. C. A. 9th Circuit.)

Also:

“The court below found that this transaction was a loan, and not an extension of the time of payment of the premium. The legal presumption is that the finding and decree of a court of chancery are right, and they should not be disturbed or modified by an appellate court unless an obvious error has intervened in the application of the law, or some grave mistake has been made in the consideration of the facts. *Stearns-Roger Mfg. Co. v. Brown*, 114 Fed. 939, 943, 52 C. C. A. 559, 563; *Kinloch Tel. Co. v. Western Electric Co.*, 113 Fed. 659, 51 C. C. A. 369; *National Hollow Brake Beam Co. v. Interchangeable Brake-Beam Co.*, 106 Fed. 693, 716, 45 C. C.

A. 544, 567; *Mann v. Bank*, 86 Fed. 51, 53, 29 C. C. A. 547, 549; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821, 36 L. Ed. 649; *Warren v. Burt*, 58 Fed. 101, 106, 7 C. C. A. 105, 110; *Plow Co. v. Carson*, 72 Fed. 387, 388, 18 C. C. A. 606, 607; *Trust Co. v. McClure*, 78 Fed. 209, 210, 24 C. C. A. 64, 65; *Exploration Co. v. Adams*, 104 Fed. 404, 408, 45 C. C. A. 185, 188.”

Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 88 (C. C. A. 8th Circuit).

Turning now to the second defense pleaded in the case at bar, which relates to the alleged failure of title to a certain portion of the land conveyed, we are again confronted with the proposition of determining the trial court's decision as a correct finding of fact and conclusion of law.

The deed given by the appellees to the appellants contained the following covenants:

“To have and to hold the above granted and described premises, described in paragraph ‘a’ foregoing, unto the said R. C. Bell, his heirs and assigns forever. And we Mary E. C. Morley and Fred Morley, her husband, grantors above named, do covenant to and with R. C. Bell, the above named grantee, his heirs and assigns, that grantor Mary E. C. Morley is lawfully seized in fee simple of that portion of the above granted premises described in paragraph ‘a’ foregoing, which said premises are free from all encumbrances suffered or created by the said Mary

E. C. Morley, and that the timber on said land described in paragraph 'b' foregoing is free from all encumbrances created or suffered by said Mary E. C. Morley, and that we will and our heirs, executors, and administrators, shall warrant and defend the above granted premises, described in paragraph 'a' foregoing, and every part and parcel thereof against the lawful claims and demands of all persons whomsoever claiming by, through, from or under us, or either of us, and the said timber described in paragraph 'b' foregoing, and with the right to remove the same within twenty (20) years from August 8th, 1906, against the lawful claims and demands of all persons whomsoever claiming by, through, from or under us, or either of us."

Paragraph "a" in the above covenant refers to property the title to which was not in dispute. Paragraph "b" refers to the timber as to which it is claimed that the title failed. As already stated, the basis of the alleged failure of title was that one of the intermediate grantees, prior in time to the appellees, recorded his deed in the "Miscellaneous Records" of Wahkiakum County, Washington, whereas the same should have been recorded in the regular record of deeds.

A careful reading of the above covenants discloses that they were only special covenants and would simply subject the appellees to an action for damages if failure of title was occasioned by the acts of the appellees or those claiming under them. As already stated, however, the alleged failure of title involved in this case was caused by a grantee

prior in time to the appellees. The deed upon which appellants base their alleged claim of failure of title contains no express covenant of seizin or of general warranty. In fact, the answer filed by the appellants, as shown on pages 27 and 28 of the Transcript of Record, fails to allege any breach of covenant and contains merely the general allegations that the appellees did not have any title to the property in question and therefore did not convey any.

All evidence relating to the alleged failure of title was objected to by the appellees upon the ground that there was no pleading to support the contention, but the trial court admitted the evidence regardless of this fact. Counsel for the appellants made no application for leave to amend his pleading, either before or after the proof, regardless of the objection raised, but, as already shown, such application would have been of no avail because the deed in question contained no express covenant of seizin or of general warranty. Therefore, no allegation could have been made as to a breach of any such covenant; and there existed no implied covenants of law, because the parties themselves had adopted certain express covenants of special warranty, limiting their liability. The numerous cases supporting the rule that no implied covenants exist where the parties have adopted certain express covenants are cited in this brief under paragraph V of Points and Authorities. The following language, used by Chief Justice Fuller, quoting with approval from a decision of the Missis-

issippi Supreme Court, very accurately and concisely states the rule in this particular:

“The covenants raised by law from the use of particular words are only intended to be operative where the parties themselves have omitted to insert covenants. And where the party declares how far he will be bound to warrant, that is the extent of his covenant.”

Douglas v. Lewis, 131 U. S. 75, 33 L. Ed. 53.

Regardless of this fact, however, there were certain circumstances peculiarly applicable to this individual case which virtually disposed of the appellants' contention as to failure of title, independently of any technical contention regarding the question of covenants or breach of covenants, and the trial court based its decision as to the appellants' contention regarding this question of title on this peculiar state of facts.

As already stated, the appellees pleaded, by way of estoppel, that the question concerning the title to this particular property was made known to the appellants prior to the consummation of the transaction between the parties. Mr. Kollock, the attorney for Mr. Bell, very frankly stated, in his testimony, on page 73 of the Transcript of Record, that Mr. Bell had full knowledge of the question of the alleged defective title before the transaction was closed and consulted Mr. Kollock to ascertain if any arrangement could be made so that he could go ahead and close the deal regardless of the alleged defective title:

“He asked me if any arrangements could be made by which he could go ahead and close the deal irrespective of the defective title. He had full knowledge of the title.”

Transcript of Record, page 73.

With this knowledge in his possession, supported and amplified by the advice of his own attorney, Mr. Bell proceeded with the closing of the deal and accepted from the appellees an agreement which provided that Harrison G. Platt and Robert Treat Platt would procure title for Mr. Bell or protect him against any damages which might be asserted on account of his proceeding to cut the timber on this particular tract; and Mr. Kollock again very frankly stated, as shown on pages 70 and 71 of the Transcript of Record, that the matter of this agreement was taken up with him and he advised Mr. Bell that Messrs. Platt & Platt were financially responsible and that the acceptance of this agreement was entirely satisfactory to him. In other words, it is admitted upon the face of the record in this case that Mr. Bell, with his eyes open and with full knowledge of the alledged defective title, proceeded with the purchase of the property in question, having this knowledge in his possession, and accepted from the appellees a deed containing no covenant of seizin and no covenant of general warranty, but, on the contrary, a deed which had only a special covenant against any acts of the appellees themselves or those claiming under them, and in conjunction with this deed accepted an agreement that as to the particular

tract the title to which was in question he would rely upon the agreement of Messrs. Platt & Platt either to procure a deed for him or else to protect him against any claim which might be made against him on account of the removal of the timber. The appellees contended, and still contend, that this agreement was accepted by the parties in lieu of any covenant in the deed as to seizin or as to warranty of title, and the trial court held these instruments—that is, the bond and the deed,—should be construed as one transaction, giving as a reason for his ruling that, as appeared from the undisputed evidence, Mr. Bell was very anxious to purchase and the appellees did not want to bind themselves absolutely to make good something of which they were not sure, and that under these circumstances the parties agreed upon the method adopted. The court's ruling in this particular can hardly be questioned, because, as stated, it was based upon the undisputed evidence of the case and was merely giving legal effect to the transaction which the parties themselves had originally created and finally acted upon. It certainly follows that a court of equity, in view of such facts, could not now permit Mr. Bell, after having taken possession of the property in question and after having had the opportunity to remove the timber on this particular tract, to come into court and seek to abate the purchase price on an alleged technical failure of title of which he had full and absolute knowledge at the time when the deal between the parties was closed.

Furthermore, as already stated, the undisputed evidence discloses that title was subsequently procured and that there existed no reason whatsoever to prevent Mr. Bell from removing the timber in question.

In view of the circumstances of this case and the evidence adduced, we respectfully urge that the trial court's finding as to the absence of any false representation should be sustained and that the trial court's holding in regard to the question of alleged defect of title should likewise be affirmed.

The appellants in their brief contend that under the statutes of the State of Washington the deed given in this case contained by implication a statutory covenant that the grantor was seized of an indefeasible title in fee simple, free from incumbrance done or suffered from the grantor. This is the first time the question has been presented by the appellants. During the trial of this case, the appellees objected to the introduction of any evidence on the question of defective title, upon the ground that the answer of appellants contained no allegation of breach of covenant, and that in cases of the sale of real property there exists no implied warranty of title and the parties are held entirely by the covenants in their deed. (Transcript of Evidence, pp. 51, 52, 53.) Appellees also moved to strike out all of the evidence offered upon the question of defect of title, upon the same and other grounds (Transcript of Evidence, pp. 74, 75). In other words, the appellees resisted at every opportunity any evidence upon

this branch of the case, owing to the fact the appellants had alleged no breach of covenant, either express or implied.

As already stated, however, the appellees take the position that covenants are never implied where the parties themselves have adopted certain specific covenants in the deed. In the case of *Barlow v. Delaney*, 40 Fed. 97, cited on page 27 of Appellants' Brief, appears the following statement:

"If from the force of the covenant it is desired to eliminate known defects or to limit the covenant in any way, it is easy to say so."

This states in concise language the position of the appellees upon this question of implied covenants in the deed now before the court, and appellees contend that the insertion of a special covenant of warranty accompanied by the specific agreement of the parties relative to the alleged defective title, made and executed before the deed itself, established a practical construction of the deed involved in this case, showing that the parties themselves intended to limit the liability of the appellees or grantors.

In the absence of this specific agreement, however, which undoubtedly makes the present case peculiar to itself, the general rule of law seems to be that, while the law of the state where the land is located governs the interpretation of the deed, it does not warrant the implication of personal covenants not authorized by the law of the state where the deed was made, and the deed involved in this case, as

shown upon its face, was signed and acknowledged by the grantors in Michigan and delivered by their attorneys, Platt & Platt, to the grantee in Oregon. This question was not argued to the trial court because the same was not raised by the appellants, and, as already stated, the appellants made no effort to amend their pleading so that the matter could be directly presented by the appellees in spite of the fact, as already stated, that the appellees objected throughout the trial to the admission of evidence upon this question.

The following authorities support the rule just referred to :

“From these cases we give it as our opinion that the following propositions of law are established: (1) The covenant of seisin, to the extent of fixing the plaintiff’s right to recover for a breach thereof, is one that runs with the land; and, if the property has been conveyed by the original grantee, the right to maintain an action for the breach of such covenant passes to the last grantee, his heirs or executors. (2) Whether a deed executed in Indiana, conveying land in another state, contains a covenant of seisin that runs with the land, is a question to be decided by the law of Indiana. If we are correct in these two propositions, it follows, as a necessary corollary, that in any action for a breach of covenant contained in a deed made in this state to real estate lying in another state, the question whether there is or is not a covenant that runs with the land must be settled according to the laws of this state.”

Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260.

“The question arises, whether a deed, executed in Indiana, between her citizens, for land in another state, but containing no covenants whatever by the law of Indiana shall be construed as containing, by implication, such covenants as would, by the law of the state where the land lies, be regarded as contained in the deed.

“This is an interesting, and a somewhat novel question. We have been furnished with able briefs by counsel for the respective parties, who have cited the general authorities upon the point, but yet no case has been found entirely in point.

“There can be no doubt that the law of Missouri, alone, can be looked to in order to determine whether the deed in question was sufficient to pass the title. In the sale and conveyance of real estate, so far as regards the capacity of the parties to convey and hold, respectively, the formalities necessary to a valid transfer, the dominion and enjoyment of the same by the vendee, and the right of succession thereto, and all other incidents to the acquisition of the land, the *lex rei sitae* governs.

“But it does not, therefore, necessarily follow that the *lex rei sitae* so far governs conveyances made elsewhere, as to change their character as mere conveyances and invest them with the character of personal covenants not necessary to the transmission of the property.”

and, after reviewing several authorities, the Indiana court concluded as follows :

“As the deed was executed in Indiana, and as the parties resided therein, it would seem that they accepted the law of Indiana as the exponent of the rights conferred and obligations imposed thereby, beyond the mere passing of the title.”

Bethell v. Bethell, 54 Ind. 428, 23 Am. Rep. 650.

A careful reading of the case last cited will also disclose that the plaintiff in said case, the same being an action for breach of covenant, specifically pleaded breach of an implied covenant in the deed. To the same effect are:

Jackson v. Green, 112 Ind. 341, 14 N. E. 89.

Phelps v. Decker, 10 Mass. 275.

As already stated, while the deed involved in this case conveyed property located in the State of Washington, the deed itself was executed and acknowledged in Michigan and delivered in Oregon, and where delivery of an instrument is necessary to the consummation of a contract between parties it seems to be universally held that the place of delivery is the place where the contract is made.

“Place of Delivery. There are many contracts, however, that are not complete and binding obligations until the actual delivery of the contract itself or the thing bargained for. Where this is true the place of delivery is the place of the contract, irrespective of the place where it was dated or signed. A note signed by a member of a partnership in the partnership name, but which is not delivered until after the dissolution

of the firm, cannot be received as a partnership obligation.”

Elliott on Contracts, Sec. 1117.

The statute of the State of Oregon, wherein the deed involved in this case was delivered, provides as follows:

“Sec. 7105. *No covenants are implied in a conveyance.* No covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not.”

Lord’s Oregon Laws, Sec. 7105.

The Federal courts will take judicial notice of the Oregon statute just cited:

“The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.”

Lamar v. Micou, 114 U. S. 218, 29 L. Ed. 94, 95.

We, therefore, respectfully submit that, regardless of the particular facts of this case relating to the execution of a separate independent agreement between the parties, specifically establishing their own construction as to the liability of the grantors under the deed of conveyance, the general rules of law above cited make inoperative the statutes of Washington to insert by implication a covenant in the deed involved in this case, which was executed and delivered in a state where no covenants are implied, and we further urge, as already contended, that, as shown

by the following authorities, no covenant would be implied, even in the State of Washington, where the parties themselves have adopted covenants of their own:

“Anders, J.—It is only necessary for us to decide one of the questions presented by the record in this case, and that is as to the sufficiency of the complaint. The case was brought to recover damages for a breach of the covenants of a deed made by appellant to the respondent. There was no special covenant against incumbrances in said deed. The only covenant relied upon and set out in the complaint was substantially as follows: * * *

“The alleged breach of covenant was the fact that certain taxes assessed by the City of Seattle and the County of King upon the land conveyed were due and unpaid, and the damages sought to be recovered were on account of the payment of such taxes. It is contended on the part of the appellant that the covenant above set out was simply one for quiet enjoyment and not one against incumbrances, and that since the only breach assigned was the existence of an incumbrance on the property the complaint upon its face showed no violation of the covenants of the deed. That the covenant is not one against incumbrances is conceded by respondent, if the language is to be construed without any aid from our statute. She contends, however, that as such statute provides that a deed which is made in the form prescribed therein, shall be construed as a warranty deed carrying implied covenants as provided for in said statute, one of which is against incumbrances, this deed must

be construed as though such covenant had been expressed therein.

“We are unable to agree with this contention. It is evident that this deed was not drawn in view of such statute, and not being so drawn the implied covenants provided for therein would not obtain. By virtue of the statute certain covenants were implied from the use of the word warrant in a deed. But these covenants were to be implied only when there were none expressed. But where, as in this case, the grantor, instead of simply using the word ‘warrant’ and leaving the statute to define what should be implied thereby, goes farther and sets out the particular thing or things which he will warrant against, he cannot be held to have intended other covenants than the ones thus set out.”

Leddy v. Enos, 6 Wash. 247, 33 Pac. 508.

The decision last cited seems conclusive upon this question and substantiates the trial court's ruling as a proposition of general law. In addition to this general rule, we have the benefit of the immediate facts of this case, showing the practical construction placed by the parties upon the covenants of the deed which was executed and delivered, finding from these facts that both parties, having knowledge of an alleged defective title, proceeded with the consummation of the transaction conveying this title, by adopting a method which specifically limited the grantors' liability on the one hand and protected the grantee against possible contingencies which might arise upon the other hand. The covenants of special war-

ranty inserted in the deed by the parties themselves, and the practical construction placed upon those covenants by the execution and delivery of the bond for the purpose of protecting the grantee eliminate the necessity of any implied covenants, and to imply any covenants would be to change the contract which the parties themselves agreed upon.

Furthermore, the deed from the appellees to the appellants conveyed the title which the appellees possessed, and there was no evidence offered by the appellants to show that they were ever disturbed in the enjoyment of this title by the assertion of an adverse right. There was no evidence offered to disprove the fact that the subsequent grantees of the property did not have actual knowledge of the title which had been conveyed to the appellees, and it affirmatively appears from the face of the evidence that the appellees have procured a deed perfecting the title to the land in question. In view of such facts, the appellants should certainly be precluded from asserting that they were unable to cut the timber upon this tract of land because of any defect in the title.

Respectfully submitted,

PLATT & PLATT,
Solicitors for Appellees.



